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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968.

No. 49

ZENITH RADIO CORPORATION, A CORPORATION,
*Petitioner,*

*vs.*

HAZELTINE RESEARCH, INC., A CORPORATION, AND
HAZELTINE CORPORATION, A CORPORATION,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF FOR RESPONDENT HAZELTINE RESEARCH, INC.

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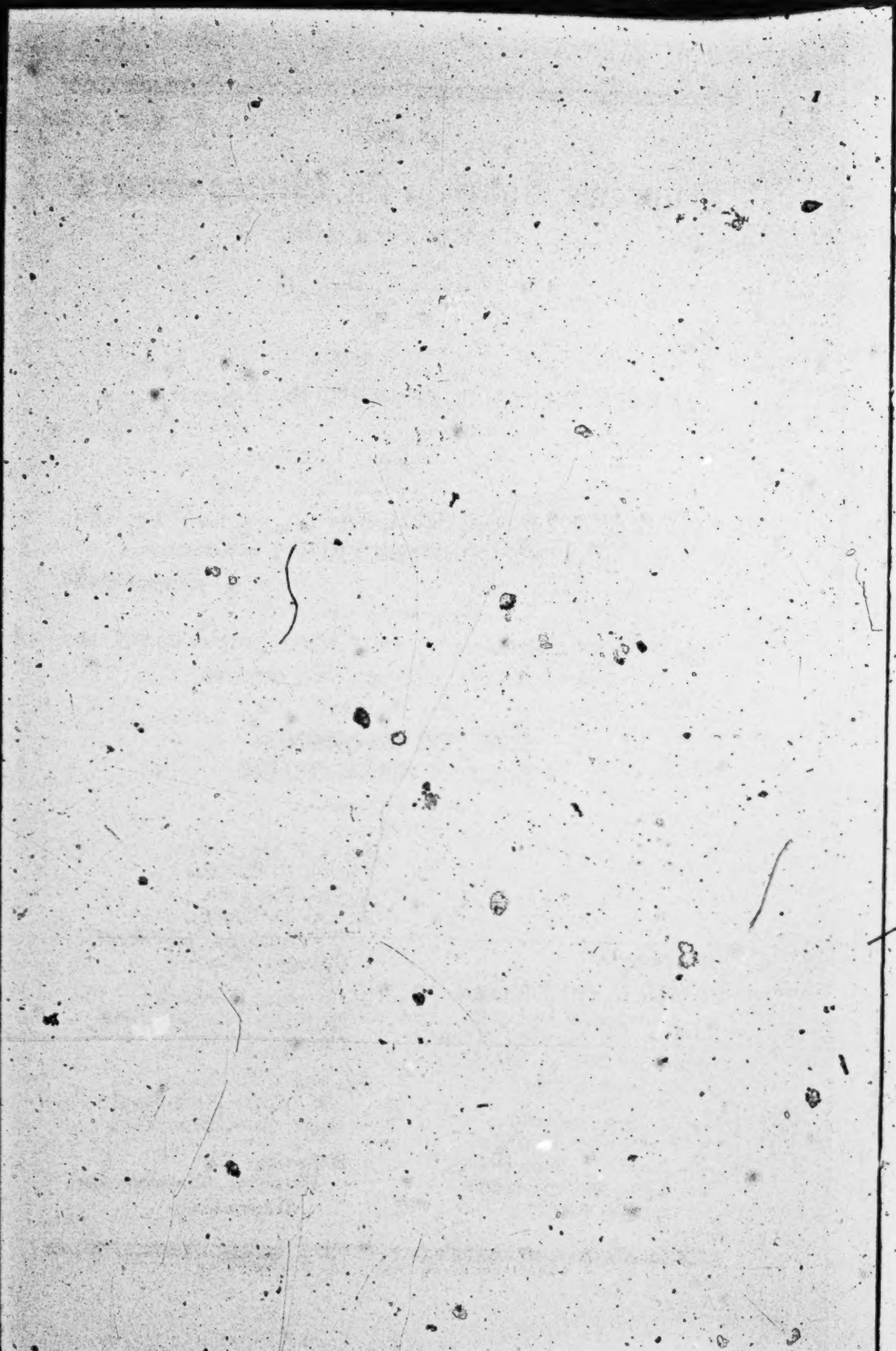

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF FOR RESPONDENT HAZELTINE RESEARCH, INC.

## FOREWORD

This case is before the Court on certiorari for review of the judgment of the Court of Appeals for the Seventh Circuit reversing treble damage judgments of the trial court in favor of petitioner Zenith Radio Corporation ("Zenith") and against Hazeltine Research, Inc. ("Hazeltine Research") and Hazeltine Corporation, respondents, in the total amount of $34,811,631.[1]

We recognize that the Court has made it clear on a number of occasions that treble damage actions should

1. The judgment order and the opinion of the Court of Appeals appear in Volume IX of the Printed Appendix (A. 4236-37, 4238-63).

be viewed as an important means to aid in the enforcement of the public policy embodied in the antitrust laws. But *public policy does not justify, nor will it condone,* attempts to misuse the antitrust laws by treble damage claims knowingly made without basis in fact. Nor is the public interest served by treble damage claims based on *tainted and discredited evidence,* on testimony which the witnesses were later forced to *repudiate and recant,* on testimony by witnesses shown to be *careless with the truth,* or on testimony which is in direct *contradiction of the contemporaneous documents* of the claimant. But that is the case here, and the Court of Appeals was right in unanimously deciding that the huge judgments entered by the trial court against the respondents had to be reversed.

If the judgments of the District Court were reinstated, they would be more than ten times the net worth of Hazeltine Research, and substantially more than the consolidated net worth of Hazeltine Corporation and all of its subsidiaries. Their assets, including valuable domestic color television patents of Hazeltine Research and foreign color television patents of Hazeltine Corporation, would potentially go to Zenith—all as a reward for a damage claim filed as an afterthought and prosecuted without any basis in fact. In short, we have here a case in which "the largest producer of television sets" in the United States (Z. Br. 59)[2] is attempting to misuse the antitrust laws to advance its position in the market.

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2. The following abbreviations are used in this brief:

| | |
|---|---|
| Z. Br. | —Brief of Petitioner, Zenith Radio Corporation |
| A. | —Citations to the printed Appendix |
| PX | —Plaintiff's exhibit |
| DX | —Defendant's exhibit |

Throughout this brief where emphasis appears in quotations, it has been supplied by us unless otherwise indicated.

## QUESTIONS PRESENTED

Zenith's statement of questions presented (Z. Br. 3-5) has little relationship to the record in this case. Substantially without exception, it assumes facts not shown by the record or ignores facts which are shown, or asserts that the Court of Appeals reached factual or legal conclusions which it did not reach. Accordingly, it is necessary to restate the questions, based on the actual facts presented and the actual rulings of the Court of Appeals.

As concerns Zenith's treble damage counterclaim referred to in Zenith's questions 1, 2 and 4 to 7, the sole question is:

> (1) Whether, considering all the evidence, the Court of Appeals erred in holding, as a matter of fact, that the trial court's finding that Zenith was damaged during the relevant four-year period (June, 1959 - May, 1963) by patent pools in England, Canada and Australia was clearly erroneous.

As to the vacation of paragraph C of the injunction relating to foreign patent pools referred to in Zenith's question 3, the sole question is:

> (2) Whether, considering all the evidence, the Court of Appeals erred in vacating the injunction relating to foreign patent pools on the ground that the record, as a matter of fact, did not show a present threat by any one of the patent pools to Zenith's ability to export to Australia, England or Canada.

As to the matter of alleged misuse of United States patents referred to in Zenith's questions 8 to 10,[3] we submit the issue is moot. However, if not moot the questions would be:

> (3) Whether the Court of Appeals erred in holding

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3. Respondent, Hazeltine Corporation, is filing its separate brief dealing with Zenith's question 11.

that the offer made by Hazeltine Research on black and white television patents was not coercive in the light of commercial realities.

(4) Whether the Court of Appeals erred in holding that the offer to license at a royalty measured by total production was not a misuse of patents.

## STATEMENT OF THE CASE

The Statement of the Case appearing in Zenith's brief omits or misrepresents many significant relevant facts. Since the issues involved are almost entirely factual, an extensive review of the record is necessary. We begin with a history of the litigation, which we believe essential to an understanding of the issues.

### I. HISTORY OF THE LITIGATION

#### The Parties on Appeal

In view of the charges made by Zenith that the "Hazeltine companies" are among the "largest electronics companies in the world" (Z. Br. 101), engaged in a vast international conspiracy destructive of Zenith's business, an identification of the parties is necessary to place the charges in perspective.

Zenith, a Delaware corporation with its principal place of business in Chicago, Illinois, is engaged in the manufacture and sale of radio and television sets (A. 64). Zenith's consolidated net sales in 1962 were $312,212,334 and its consolidated net earnings after taxes were $19,637,068 (PX 62, A. 2849, 2854). Moody's Industrial Manual at 2216 (1968) indicates that Zenith's 1967 earnings after taxes were over $40,000,000.

Hazeltine Research is an Illinois corporation having its principal place of business in Chicago. It is not a manu-

facturer but is engaged solely in the business of research and development, ownership and licensing of United States patents, principally in the fields of television and radio (A. 142). It owns no foreign patents (A. 20). In 1964, the most recent year for which figures are in the record or of public record, the net income of Hazeltine Research after taxes was $219,777 and its net worth as shown on its December 31, 1964 balance sheet was $3,184,419 (A. 3007).

Hazeltine Corporation, which owns all of the stock of Hazeltine Research, is a Delaware corporation with principal offices at Little Neck, Long Island, New York.[4] It is engaged primarily in the business of research, development and manufacture of electronic equipment for military and related purposes for the United States Government and its allies (A. 145, DX 1, A. 940-47). It owns foreign patents in the television and radio fields but owns no domestic patents in those fields and does not manufacture or sell radios or television sets (A. 145, DX 1, A. 940-47). In 1964, the consolidated net income after taxes of Hazeltine Corporation and its subsidiaries, including Hazeltine Research, was $1,132,092 (A. 3007), and Hazeltine Corporation's 1967 earnings were $2,044,834 as indicated in Moody's Industrial Manual at 822 (1968). The consolidated net worth of Hazeltine Corporation and its subsidiaries on December 31, 1964, was $21,068,763 (A. 3007), *i.e.*, less than Zenith's current annual income.

The foreign patents of Hazeltine Corporation have been

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4. Hazeltine Research, plaintiff in the patent infringement claim, and Zenith entered into a "Pre-trial Stipulation" which provided, *inter alia*, that: "Plaintiff agrees that for purposes of this litigation Plaintiff and its parent Hazeltine Corporation will be considered to be one and the same Company" (A. 55). Thus, Hazeltine Research agreed that in this litigation it would stand good for the acts of its parent.

licensed to so-called "patent pools" in England, Canada and Australia,[5] but neither Hazeltine Research nor Hazeltine Corporation has ever been a member of the pools (A. 149-50, 174, 191, 252-53, 344, 350).

## The Pleadings

*The Patent Suit:* On November 20, 1959, Hazeltine Research, as sole plaintiff, filed the complaint in this case in the United States District Court for the Northern District of Illinois against Zenith for infringement of its United States Letters Patent No. 2,547,648 relating to an automatic-control system for television apparatus (A. 11-13). On April 7, 1960, Zenith filed its answer alleging invalidity and non-infringement, and further alleging that the patent was unenforceable by reason of patent misuse and unclean hands (A. 14-19).

The patent misuse charge was based solely upon Hazeltine Research's alleged package licensing of its United States patents (Answer, para. 12, A. 16-18). The unclean hands defense asserted that plaintiff Hazeltine Research conspired with foreign patent pools in Canada, Australia, Great Britain and elsewhere which were said to have refused to license or permit the sale of radio and television apparatus imported from the United States under threat of patent litigation against distributors and purchasers of such apparatus, all of which was alleged to constitute a violation of the Sherman Act (Answer, para. 13, A. 18-19). Although Zenith now claims that at the very time of its answer it was losing enormous sales and suffering immense damage because of the refusal of the patent pools to permit

5. Throughout this brief we have used the term "patent pool" as a term of convenience to describe placing patents of more than one company under common ownership or control. There is, of course, nothing illegal in patent pools as such, and our use of the term is not an agreement that any of the pools were unlawful.

imports to England, Canada and Australia, no counterclaim for damages was filed with the answer and none was filed for more than three years thereafter.

*The Counterclaim:* On May 22, 1963, over three years after filing its answer, Zenith, with leave of court, filed its counterclaim for damages against Hazeltine Research charging violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) (A. 64-69). To obtain leave to file the counterclaim at such a late date, Zenith filed the sworn statement of Francis Crotty, its vice president and a counsel of record, that the matters "which are the proximate cause of damages alleged and require the relief sought in said counterclaim, *occurred after the filing of the answer herein", i.e. after* April 7, 1960 (A. 63). It made the same representation in its motion for leave to file the counterclaim (A. 62).[6]

The counterclaim re-alleged paragraphs 12 and 13 of the answer as to package licensing of domestic patents and foreign patent pool conspiracies, and also the pendency of the instant patent infringement suit, and allegedly improper licensing offers by Hazeltine Research on its United States television patents subsequent to the filing of Zenith's answer (A. 65-67). However, at the trial Zenith

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6. Counsel for Zenith admitted in its motion for leave to file the counterclaim that "said counterclaim is compulsory" (A. 62). Thus, had such a claim existed in 1960 when the answer was filed, it was likewise compulsory and accordingly was required by Fed. R. Civ. P. 13(a) to have been filed with the answer. If it had not been for the sworn representation made to the court when the counterclaim was filed in 1963 that the matters causing damage and requiring relief sought in the counterclaim occurred *after* the filing of the answer, the filing of the counterclaim three years after the answer would not have been permissible under Rule 13(a).

made no claim or proof that these acts involving the U.S. patents had interfered with its foreign commerce. Zenith's counsel specifically stated that they "didn't have anything to do with" the alleged foreign conspiracy (A. 428), and *both* the trial court and the Court of Appeals so found (see pp. 126-28, *infra*).

## The Antitrust Trial and Findings

In February 1964, trial on the antitrust counterclaim (and the patent misuse defense) was held by the court without a jury.[7] The trial lasted about seven days and thereafter, Zenith filed findings and conclusions which were adopted by the trial court *in toto* (A. 2857-58).

In the course of the trial and in the findings submitted by Zenith to the trial court, Zenith repudiated the representation of its counsel under oath to the trial court that the matters "which are the proximate cause of damages alleged and require the relief sought in said counterclaim, occurred after the filing of the answer herein" (A. 63). Instead, its position as set forth in detail in its findings was that the injury of which it was complaining resulted from the acts of the so-called "patent pools" going back for many years into the 1920's and 1930's.

This was all set forth in Zenith's proposed findings, which were divided under three headings: "The British Patent Pool," Findings XV through XXIV (A. 2899-2903); "The Patent Pool in Canada," Findings XXV through XXXII (A. 2903-06); and "The Australian Pool," Findings XXXIII and XXXIV (A. 2906-07). As to each country, it was asserted that a "pool" had been created by the dominant manufacturing companies in that country for the purpose

7. The patent validity and infringement issues had been tried the previous Fall.

of licensing the radio and television patents issued in that country. Hazeltine Research was alleged to be a co-conspirator because its parent Hazeltine Corporation, though not a member of any pool, had permitted its patents in each country to be included (by license or sublicense) in the pool, with knowledge of that pool's alleged policy and agreements with respect to imports (Findings XVII, XXV, XXXIV, A. 2900, 2903, 2907; see also Conclusions X, XI, A. 2910-11). It was charged that the Hazeltine Corporation patents had been in pools since 1938, in England (Finding XVI, A. 2900), since 1943, in Canada (Finding XXV, A. 2903), and "for 35 years," in Australia (Finding XXXIV, A. 2907).

The acts of the patent pools which were said to have caused Zenith's injury were (a) their refusal to grant Zenith a license to import, and (b) their bringing suit or threatening suit against those who imported Zenith products without a license. Zenith claimed that these acts, which were said to have gone on for many years, both blocked its current attempts to import, and also prevented Zenith from previously building up a market in the three countries from which it could have derived profits during the alleged four-year damage period.

As to England, Finding XXI stated:

> "*For years* Zenith made every effort to export home receivers to distributors and dealers in the English market. *On each occasion,* however, the Pool threatened its distributors until they ceased buying Zenith products and no substantial trade outlets could be found which would risk handling the line since the Pool would not license the sale of imported merchandise" (A. 2901).

As to Canada, Finding XXIX stated:

> "For *many years* Zenith attempted to set up distribution for its products in Canada but *in every instance* where a Canadian distributor began to sell Zenith products he was warned by the Pool to stop and return the merchandise or face expensive infringement litigation. To ward off these attacks Zenith attempted to get a license from the Pool, but in every instance it was advised by the Pool manager that importation would not be permitted and, only local manufacture would be licensed" (A. 2905).

As to Australia, the proposed findings contained no statement that Zenith had attempted to obtain a license or that the patent pool had made any threats against Zenith or anyone attempting to import Zenith's sets. However, Finding XXXIV stated, *inter alia*, that "Hazeltine's" Australian patents had been in the Australian pool "for 35 years" subject to a "standard package license," and that:

> "A standard Pool license imposes the restrictions necessary to effectuate the division of territories involved in the over-all arrangements. It requires the licensee to agree not to export or import or sell or offer for sale in Australia any radio or television receiving apparatus not manufactured in Australia" (A. 2907).

The evidence offered by Zenith as to all three countries consisted largely of numerous ancient documents marked as deposition exhibits in a previous case in which Zenith had made substantially the same charges in a counterclaim against RCA, General Electric, and Western Electric.[8] That case was settled in September 1957 (A. 2751). All of this evidence offered by Zenith in the case at bar related to acts which took place prior to the September 1957 settlement, *i.e.*, over five years before the filing of the

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8. RCA v. The Ranland Corp. and Zenith Radio Corp., Civil Action No. 48 C 1818, N.D. Ill.

counterclaim herein and almost three years before the answer was filed.

Zenith also put in evidence in the case at bar certain written pool agreements and license forms in the respective countries, and agreements between Hazeltine Corporation and its licensees in each of the countries (England: DX 51-71, A. 1194-1401; Canada: DX 118-24, A. 1645-1833; Australia: DX 180-95, A. 2305-2476), ascribing to them interpretations and effects which, as we shall show, were clearly wrong.

Wright, Zenith's president, and Kaplan, its executive vice president, gave some brief, general testimony, stating or implying that Zenith had been kept out of England, Australia and Canada by the pools for many years prior to 1959; that such interference had continued during the 1959-1963 period; and that but for this long standing interference Zenith would in the four-year period have had a share of the Canadian market equal to the share it had built up in the United States; a percentage of the English market equal to one-fourth its U.S. percentage, and a percentage of the Australian market equal to one-tenth its U.S. percentage (A. 457, 461, 465, 528-30; see also, A. 3446). *As we shall show, substantially all of this testimony was discredited and destroyed (in later proceedings in the case) not only by other evidence, including Zenith's own documents, but by the repudiation of their testimony by these same witnesses when its inherent incredibility had been revealed.*

Zenith claimed damages for the entire four-year period preceding the filing of the counterclaim, based on what was later referred to in the proceedings as the "mature market" or "established market" theory (*e.g.*, A. 3033, 3204). Zenith asserted that but for the alleged restrictive practices of

the pools going back over many years, it would have been making exports to and sales in England, Canada and Australia for many years and thus by the beginning of the four-year period (June 1, 1959) Zenith would have *built up* an established market for its products in those countries (*e.g.*, A. 457, 465). Thus, it claimed as damages the entire profits it supposedly would have made from such established market in each country during the four-year period, minus sales actually made (A. 3203-04; see also A. 457, 461, 465).

Stevenson, an accounting employee of Zenith, prepared and put in evidence a summary, DX 220 (A. 509-19, 2661), purporting to show for each year or partial year of the four-year period beginning June 1, 1959,[9] its alleged lost sales and lost profits for each country.

On January 25, 1965, the court entered *verbatim* and without opinion Zenith's proposed findings of fact and conclusions of law, changing not so much as a comma. Finding XXXVI stated that "The foreign commerce of Zenith has been drastically curtailed by the patent Pools in England, Canada and Australia" (A. 2908), and that during the "4-year statutory damage period" Zenith's foreign commerce had been damaged in the amount of $6,297,392 as to Canada, $9,248,926 as to England, and $692,555 as to Australia, totaling $16,238,872, which after trebling would have amounted to approximately $48.7 million. As we shall show, the trial court itself later recognized that almost $14 million of this total would have been awarded erroneously, based on testimony of Zenith wit-

9. Zenith used the period beginning June 1, 1959, in its computations rather than May 22, the actual beginning of the four-year period preceding the date of the counterclaim. The calendar periods shown were thus the last seven months of 1959, the full years 1960, 1961 and 1962, and the first five months of 1963.

nesses characterized by the trial court as not "believable" —the very witnesses on whose testimony Zenith places principal reliance in its brief to this Court.

## The Motions To Set Aside Findings and The Offers of Proof

The date for entry of judgment was postponed to permit additional counsel retained by Hazeltine Research after entry of the findings to study the record and file motions as appropriate. On March 26, 1965, before entry of judgment, Hazeltine Research filed its motion for withdrawal of the antitrust findings and conclusions and other relief, requesting that the counterclaim be dismissed as not proven, or in the alternative, that there be an opportunity for further discovery and proof (A. 2939-51). Supporting memoranda and offers of proof were also filed (A. 2955-97).

The motion pointed out, *inter alia,* that the theory of damages embodied in the findings and conclusions was different from that pleaded, that the theory embodied in the findings and conclusions had not been proved, and that there were matters and defenses relevant to the new theory which should be before the court, but were not pleaded or raised because not relevant to the counterclaim pleaded.

Hazeltine Research offered to prove, as to England and Australia, that during the period from World War II to June 1959 as to England, and to April 1960 as to Australia, there had been governmental embargoes prohibiting importation of radio and television receivers from dollar countries, so that it was the *acts of the governments,* and *not* the patent pools which were responsible for Zenith's inability to build up a market by June 1959 (A. 2986-90).

As to Canada, Hazeltine Research offered to prove that in the 1957 settlement of the Zenith-RCA case, Zenith had

given broad releases covering damages which might thereafter result from past acts of the pool (A. 2957-60). Since Zenith asserted that Hazeltine Research was a co-conspirator with the defendants in that case, those releases covered all claims against Hazeltine Research for future loss of market share and profits occasioned by acts of the Canadian pool taking place prior to the releases. Further as to Canada, Hazeltine Research's offer of proof included excerpts from Zenith's Annual Reports for the years 1957 to 1961, inclusive, which were in direct conflict with the testimony of Zenith witnesses Wright and Kaplan as to a supposed damaging impact by the Canadian pool on Zenith imports into Canada (A. 2990-95).

### Proceedings Following the Motions to Set Aside the Findings

Following argument on the motions, the trial judge ruled from the bench on April 1, 1965 (A. 3036-39), as follows:

1. He ruled that there should be hearings on the governmental import restrictions to determine "whether or not radios and television could have been imported into England and . . . [Australia] in commercial quantities prior to the start of the damage period" (A. 3038);

2. He granted leave for Hazeltine Research to file the defenses of release and statute of limitations before entry of judgment (A. 3037);[10]

3. He stated that except for the amount of damages as to England and Australia, he was prepared to enter a final judgment and decree in the form which had been submitted by Zenith (A. 3037-38).

On April 5, 1965, the trial court entered its first judg-

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10. The affirmative defenses of release and limitations were filed (A. 3049-53) but the motion of Hazeltine Research to dismiss on these grounds (A. 3048) was denied (A. 3062).

ment as a "Final Judgment And Decree" (A. 3078-80).[11] Under this judgment:

(a) the patent in suit was held invalid and not infringed;

(b) Hazeltine Research and Hazeltine Corporation were enjoined from engaging in certain generally described licensing activities as to domestic patents with respect to Zenith and from engaging in concerted activities with others directly or indirectly restricting Zenith from exporting to foreign markets;

(c) Zenith was granted treble damages in the amount of $19,042,173 ($18,892,173 for the Canadian market and $150,000 for the domestic patent activities) plus costs and attorneys' fees to be fixed by subsequent order; and

(d) jurisdiction was reserved for the further hearings on damages in relation to the Australian and English markets (A. 3078-80).

On April 19, 1965, the court entered an order granting stay of execution of the judgment and approved the form of supersedeas bonds,[12] and separate appeals were taken

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11. Hazeltine Research objected to entry of this "Final Judgment And Decree" on the grounds that it was fragmentary and premature, and also objected to the scope and wording of the injunctive provisions as not being in conformity with the findings and conclusions and not meeting the requirements of Rule 65(d) of the Federal Rules of Civil Procedure (A. 3054-59). Hazeltine Corporation filed a special appearance objecting to its being named as a party to the judgment (A. 3008).

12. Since both Hazeltine Research and Hazeltine Corporation were financially unable to furnish normal supersedeas bonds, the court approved a special supersedeas bond trust agreement under which they transferred legal title to all of their patents to The Northern Trust Company, as trustee, and deposited a total of $5 million in government bonds with the trustee. In addition, both corporations were prohibited from declaring any dividends pending the determination of the case.

by Hazeltine Research (A. 3082-83) and Hazeltine Corporation (A. 3084-85).

### The Hearings and Ruling on the Governmental Embargoes

Zenith counsel repeatedly and vigorously denied that Zenith's exports were blocked by governmental embargoes in England and Australia which Hazeltine Research had offered to prove (A. 3089-91, 3103, 3181-82) and accordingly the court set the matter down for hearing, providing the parties time to collect evidence and interview witnesses in England and Australia (A. 3089-91; 3113-14).

On August 26, 1965, the court entered an order further defining its oral order of April 1, 1965, stating that if the import restrictions were proved, "the Court will fix a date for a future hearing on the question of market share" and would give time for necessary discovery and depositions in foreign countries in that event (A. 3114).

There was a four-day hearing in October 1965 at which Hazeltine Research offered documentary evidence and testimony, including that of present and former governmental officials from England and Australia, establishing that embargoes barring imports of American-made radio and television sets had been imposed by the governments of England and Australia at the beginning of World War II and continued until June 1959, as to England, and April 1960, as to Australia (A. 3119-3202). At the conclusion of these hearings and oral argument, the trial judge ruled (A. 3202-06) that the existence of English and Australian governmental restrictions had been established and that these restrictions and *not* the patent pools had been the sole reason preventing Zenith from importing radio and television sets into those countries prior to the damage period. The trial judge said:

"[T]he Court finds that the reasons that completed television and radio sets were not sold in the United Kingdom and Australia prior to the damage period was due to the fact that *they could not pass the iron curtain of government license restrictions* or embargoes . . . (A. 3203).

• • •

"The Court finds that the *embargoes and nothing else* were the cause of keeping completed sets out of the country prior to the damage period" (A. 3205).

Zenith never appealed these findings. *Thus, Zenith's contention* (embodied in its findings, see pp. 8-10, *supra*) *that the "patent pools" had kept Zenith from building up a market share in England and Australia prior to June 1959, was exposed as untrue on the face of the record.*

Contrary to his previously announced intentions (A. 3114), the trial court refused to reopen the matter for general hearings as to market share. Instead, he ruled as follows:

"It is my opinion, from my recollection of the record, *that the same basis for establishing damages was used in England and Australia as was used in Canada; that is, there would have been an established market but for the pool.*

"It is my impression from the record, . . . that the *figures offered* [*i.e.*, Exhibit 220, A. 2661] as to damages by those who testified regarding them was based upon this prior ability to establish a market which was prevented by the pool.

"I intend to request those witnesses who testified to indicate more clearly than the record does what method was used in determining the share of the market in the two countries involved in this hearing, whether it was on the basis that Zenith could have established a share of the market prior to the damage period, or whether

the figures they used were figures that would be used in regard to a product newly introduced into the country.

"If it is ascertained that damages were figured in regard to these two countries as they were in regard to Canada, where the original premise did not exist, the Court will permit Hazeltine to present proof in rebuttal or present proof to contradict the estimates of damages heretofore given in regard to those two countries" (A. 3204).

### The Recall Testimony of The Zenith Witnesses

Wright and Kaplan, Zenith's president and executive vice-president, on whose testimony Zenith's entire damage claim rested, were recalled to testify on November 22, 1965, as to the "basis for establishing damages" (A. 3204) which they had used in England and Australia. They were faced with certain dilemmas.

First, at the original trial they had contended, and led the trial court to believe that for many years the "pools" had kept Zenith out of Canada, England and Australia (A. 3204, 3446),[13] and this contention was shown to be false as to England and Australia by proof of the governmental embargoes.

Second, proof of the embargoes destroyed the theory under which the damage exhibit (DX 220, A. 2661) had

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13. "By Mr. Kayser: [cross-examination of Kaplan on recall]

Q. Now, isn't it a fact, Mr. Kaplan, that Zenith has taken the position from the beginning of this litigation *that for many years it was excluded by patent pools* from importing radio and television sets *into all three countries,* Canada, England and Australia?

The Court: *Well, it has not only taken that position, Counsel, but they persuaded the Court to so find*" (A. 3446).

been prepared. At the original trial, Wright and Kaplan had claimed that Zenith's market in each country would have been in a direct ratio to Zenith's share of the United States radio and television market (approximately 20 per cent). They said that Zenith's percentage share of the Canadian market would have exactly equaled its United States percentage; its percentage share of the English market would have equaled one-quarter of its United States percentage; and its Australian percentage would have been equal to one-tenth of its United States percentage (see pp. 11-12, *supra*). DX 220 (bound in this brief facing p. 23, *infra*) applied these percentages to each accounting period starting June 1, 1959 (*i.e.*, June-December 1959, 1960, 1961, 1962 and January-May 1963), and purported to show Zenith's alleged rightful market share, alleged lost sales, and alleged lost profits for *each* of the accounting periods including the first. Since it applied the full expected market share in each accounting period including the first, DX 220 was necessarily based on the assumption that the patent pools were responsible for Zenith's failure to have built up to that full expected market share in all countries *prior* to the beginning of the four years. But the finding that the "governmental embargoes" and *not* the patent pools had kept Zenith from building up a market in England and Australia made such an assumption impossible as to those countries.

Faced with these dilemmas, the witnesses on recall repudiated their testimony and Zenith's prior contentions.

First, they both testified, despite their counsel's repeated assertions to the contrary, that they *knew all the time* about the English and Australian embargoes and their effect (Kaplan, A. 3441, 3448-49; Wright, 3490-93).

Second, they testified that their estimates of market

share had been based on a *different assumption* in England and Australia from that used for Canada. They testified that in making their estimate of Zenith's expected market share *in Canada* they *had* assumed that, *but for the patent pool,* Zenith would have built up an established market share in Canada *prior* to the start of the damage period; *i.e.,* that but for the "pool" Zenith would have started the damage period with a "full blown organization" and with a market share developed by doing business in Canada over a "great many years" prior thereto (Kaplan, A. 3440, 3465; Wright, A. 3490-91).

However, as to England and Australia, they said, the percentages they had given at the original trial as Zenith's expected market share were based on the assumption of *no prior entry* or build-up and that Zenith would have been "starting from scratch" in those markets on June 1, 1959, the first day of the damage period (Kaplan, A. 3437; Wright, A. 3490). Kaplan explained the variation as follows:

"Q. What do you mean by starting from scratch, Mr. Kaplan?

A. That we didn't have an established dealer organization or marketing organization in England.

THE COURT: Or Australia?

THE WITNESS: Or Australia.

• • •

Q. Did you make the same assumption as to Canada?

A. No.

• • •

Q. What was your assumption as to Canada?

• • •

THE WITNESS: . . . In Canada, our assumption was that we commenced the period starting June 1, 1959 as if we had had a full blown organization, and had enjoyed the benefits of doing business there for years prior to that date.

. . . .

Q. All right. Why did you engage in that assumption in Canada and not in England and in Australia?

A. *Because we knew that in England and in Australia, there were restrictions on the importation of our products.*

Q. Are you referring to the governmental restrictions on the import of completed radio and television sets?

A. Excuse me. I am referring to the governmental restrictions on the availability of exchange, and the unavailability of import quotas.

Q. You kept that in mind both in England and Australia?

A. Yes, sir" (A. 3438-41).

He testified further that *Zenith's counsel had suggested the June 1, 1959*, date, and told him "that there were no restrictions after that date" (A. 3449; see also A. 3441).

The net effect was that these witnesses were now testifying under oath that they had known all along about the existence and effect of the governmental import restrictions, although they had not told the trial court at the trial that they were taking such embargoes into consideration (see, *e.g.*, A. 528-30). Furthermore, in opposing reopening the proofs, Zenith counsel had vigorously denied that governmental embargoes blocked imports into Eng-

land and Australia[14] and had forced the bringing of witnesses from England and Australia and a four-day hearing to prove the embargoes, which Zenith's witnesses said at the subsequent hearing they had known about all the time and had taken into account in their testimony at the suggestion of counsel (A. 3441, 3449).

In addition, they were still faced with the dilemma that Zenith's Exhibit 220 (A. 2661) purported to show Zenith's market shares, lost sales and lost profits for each accounting period in amounts which on their face would be an impossibility if Zenith started "from scratch" on June 1, 1959. For example, Exhibit 220 asserted that in England, Zenith should have sold 63,210 television sets and made $1,517,357 in profits during the June 1 - December 31, 1959 period, an obvious impossibility unless Zenith had developed a market prior to June 1, 1959 (see A. 3525-26).

Although Exhibit 220 itself and the testimony at the original trial showed that the exhibit had been prepared on exactly the same basis for all three countries, except only for the differences in the presumed percentage market shares (A. 509-19), Wright and Kaplan proceeded to reconstrue Exhibit 220. They testified on recall that it should be *interpreted* in one way as to Canada, and *differently* as

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14. During a proceeding relating to the fixing of a trial date for the embargo hearing, counsel for Hazeltine Research explained that his investigation had shown, and he expected to prove, that there was an embargo in England until June 7, 1959, and in Australia into 1960 which blocked the importation of radio and television sets from the United States. The court asked whether there was any contest with respect to the matter, and Zenith counsel answered: "Definitely. *I don't agree with a word that the man said, not one word.* • • • I made some investigations, too. We can prove exactly the opposite of what he said" (A. 3089-91; see also A. 3182).

DX 220

# LOST SALES AND LOST PROFITS IN TELEVISION AND RADIO IN CANADA, UNITED KINGDOM AND AUSTRALIA—June 1, 1959 to May 31, 1963

| | Market (Units) | Zenith Share of Market (%) | Zenith Share of Market (Units) | Zenith Sales in Market (Units) | Lost Sales in Market (Units) | Zenith Av. Fact. Sell. Pr. to Canada (U.S. $) | Lost Sales in Market (U.S. $) | Profit Applying to Add. Volume (%) | Lost Profit on Lost Sales (U.S. $) |
|---|---|---|---|---|---|---|---|---|---|
| **CANADA** | | | | | | | | | |
| **Television** | | | | | | | | | |
| 1959 6/1–12/31 | 235,900 | 15.616 | 36,838 | 7,343 | 29,495 | 148.73 | 4,386,791 | 16.14 | 708,028 |
| 60 | 338,400 | 17.992 | 60,885 | 13,396 | 47,489 | 145.68 | 6,918,198 | 16.14 | 1,116,597 |
| 61 | 355,200 | 17.638 | 62,650 | 17,295 | 45,355 | 144.16 | 6,538,377 | 20.63 | 1,348,867 |
| 62 | 420,200 | 17.475 | 73,430 | 14,195 | 59,235 | 136.80 | 8,539,318 | 22.06 | 1,883,774 |
| 63 1/1–5/31 | 147,000 | 21.712 | 31,917 | 4,766 | 27,151 | 128.38 | 3,485,645 | 22.08 | 769,630 |
| | 1,496,700 | | 265,720 | 56,995 | 208,725 | | 29,868,329 | | 5,826,896 |
| **Radio** | | | | | | | | | |
| 1959 6/1–12/31 | 270,200 | 12.839 | 34,691 | 10,238 | 24,453 | 35.24 | 861,724 | 16.02 | 138,048 |
| 60 | 393,600 | 12.316 | 48,476 | 16,935 | 31,541 | 28.77 | 907,435 | 16.02 | 145,371 |
| 61 | 296,400 | 11.332 | 33,588 | 18,906 | 14,682 | 26.59 | 390,394 | 17.48 | 68,241 |
| 62 | 273,300 | 10.664 | 29,145 | 15,062 | 14,083 | 27.12 | 381,931 | 19.80 | 75,622 |
| 63 1/1–5/31 | 89,300 | 12.937 | 11,553 | 4,059 | 7,494 | 27.59 | 206,759 | 20.90 | 43,213 |
| | 1,322,800 | | 157,453 | 65,200 | 92,253 | | 2,748,243 | | 470,495 |
| **UNITED KINGDOM** | | | | | | | | | |
| **Television** | | | | | | | | | |
| 1959 6/1–12/31 | 1,619,100 | 3.904 | 63,210 | 0 | 63,210 | Same | 9,401,223 | Same | 1,517,357 |
| 60 | 1,816,800 | 4.498 | 81,720 | 1 | 81,719 | | 11,904,824 | | 1,921,439 |
| 61 | 1,508,400 | 4.410 | 66,520 | 21 | 66,499 | | 9,586,496 | | 1,977,694 |
| 62 | 1,370,400 | 4.369 | 59,873 | 28 | 59,845 | | 8,186,796 | | 1,806,007 |
| 63 1/1–5/31 | 557,500 | 5.428 | 30,261 | 15 | 30,246 | | 3,882,981 | | 857,362 |
| | 6,872,200 | | 301,584 | 65 | 301,519 | | 42,962,320 | | 8,079,859 |
| **Radio** | | | | | | | | | |
| 1959 6/1–12/31 | 748,300 | 3.210 | 24,020 | 1,488 | 22,532 | Same | 794,028 | Same | 127,203 |
| 60 | 1,552,000 | 3.079 | 47,786 | 1,604 | 46,182 | | 1,328,656 | | 212,851 |
| 61 | 2,429,000 | 2.833 | 68,814 | 1,274 | 67,540 | | 1,795,889 | | 313,921 |
| 62 | 2,384,000 | 2.666 | 63,557 | 1,319 | 62,238 | | 1,687,895 | | 334,203 |
| 63 1/1–5/31 | 982,000 | 3.234 | 31,758 | 388 | 31,370 | | 865,498 | | 180,889 |
| | 8,095,300 | | 235,935 | 6,073 | 229,862 | | 6,471,966 | | 1,169,067 |
| **AUSTRALIA** | | | | | | | | | |
| **Television** | | | | | | | | | |
| 1959 6/1–12/31 | 239,800 | 1.562 | 3,746 | 2 | 3,744 | Same | 556,845 | Same | 89,875 |
| 60 | 370,300 | 1.799 | 6,662 | 9 | 6,653 | | 969,209 | | 156,430 |
| 61 | 299,700 | 1.764 | 5,287 | 2 | 5,285 | | 761,886 | | 157,177 |
| 62 | 284,600 | 1.748 | 4,975 | 1 | 4,974 | | 680,443 | | 150,106 |
| 63 1/1–5/31 | 117,300 | 2.171 | 2,547 | 0 | 2,547 | | 326,984 | | 72,198 |
| | 1,311,700 | | 23,217 | 14 | 23,203 | | 3,295,367 | | 625,786 |
| **Radio** | | | | | | | | | |
| 1959 6/1–12/31 | 138,100 | 1.284 | 1,773 | 1 | 1,772 | Same | 62,445 | Same | 10,004 |
| 60 | 279,800 | 1.232 | 3,447 | 9 | 3,438 | | 98,911 | | 15,846 |
| 61 | 287,700 | 1.133 | 3,260 | 3 | 3,257 | | 86,604 | | 15,138 |
| 62 | 284,800 | 1.066 | 3,036 | 12 | 3,024 | | 82,011 | | 16,238 |
| 63 1/1–5/31 | 129,700 | 1.294 | 1,678 | 23 | 1,655 | | 45,661 | | 9,543 |
| | 1,120,100 | | 13,194 | 48 | 13,146 | | 375,632 | | 66,769 |
| | | | | | | | 85,721,857 | | 16,238,872 |

to England and Australia. The net result of many pages of evasive answers (A. 3442-70) was that, although Exhibit 220 had exactly the same format as to all three countries purporting as to each to show lost sales and lost profits for each accounting period (see facing page), it was claimed that as to *Canada* the exhibit involved an accurate presentation of the market share, sales and profits which Zenith could, in fact, have achieved in each accounting period shown in the exhibit (Kaplan, A. 3462, 3465), but that in the case of *England and Australia* the exhibit was not intended to show potential sales and profits at all for any accounting period (Kaplan, A. 3442-70). Rather, it was asserted that as to England and Australia the *four-year totals* were correct, but the figures for *each accounting period* were repudiated, as being merely "accounting computations" (Kaplan, A. 3460-62) used to arrive at the four-year totals. Thus Kaplan testified as to England that "in the four-year period" Zenith could have done the total amount of business shown in the Exhibit 220 (A. 3442), but whenever asked whether Zenith could have sold the amount of sets claimed during *any particular period,* or would have made the profits shown for any particular period, the answer was "I don't know" (A. 3443, 3444, 3467). For example:

> "Q. . . . Is it Zenith's position, or your position, or your conglomerate position that for the last seven months of 1959, Zenith, starting from scratch on June 1, 1959 could have made a profit of $1,517,357 from the sale of television sets, [in England] starting from scratch?
>
> A. *If we took the position that we could sell 63,210 units in that exact seven-month period,* that would be so. *We have not taken that position* except for the purpose of an *accounting computation,* which I say is *better off considered in its entirety.*

Q. This is an accounting computation in this Exhibit 220; is that it?

A. That's right.

Q. Was your figure in Canada also an accounting computation?

A. No, *that's historical.*

• • •

Q. But these were the figures [DX 220 for England] you presented to the Court; right?

A. For a mathematical computation.

Q. And these were the figures that were totaled in your finding in this case for damages; right?

A. They are in the mathematical computation.

• • •

Q. I asked the question whether in the case of Canada the figures would show a historical amount.

A. I'm not sure that the word 'historical' is the correct word. But Canada was based on a different background, a different set of assumptions, that we were not enjoined from doing business there by anything except the pool, and that we would have been doing business there for a great many years prior to the damage period" (Kaplan, A. 3461-65).

•

After hearing this testimony, the court ruled from the bench (A. 3524-27), stating:

"I feel that in regard to both countries [England and Australia], it is unrealistic to believe that starting out from scratch they could have achieved the percentage of the market and the percentage of profits that Exhibit 220 indicates they might receive (A. 3525).

• • •

"The Court has difficulty in believing—and as I understand it, *I'm not bound by the fact that evidence is uncontradicted and undenied; it must be believable in*

> *the first instance.* And the Court is aware of the pride of officers in their corporation, and the belief in their product, but it is unrealistic to the Court for me to believe that Zenith, as a quality item, selling in excess of locally manufactured items, could have attained the profits for Zenith that are indicated by the *guesstimate* which everybody indicates is what Exhibit 220 is" (A. 3525-26).

The changes in testimony present shocking alternatives: either the witnesses were not testifying truthfully when they asserted on recall that they gave their original testimony with full knowledge of the existence and effect of the English and Australian embargoes (which if true they had not revealed to the court at the original trial); or, on the other hand, Zenith's witnesses had knowingly misled the court into believing that the patent pools had kept Zenith out of the two countries, and its counsel had attempted to perpetuate that deception by deliberately misrepresenting the facts when he denied that the embargoes blocked Zenith's imports knowing all along that Zenith's witnesses at his suggestion had testified with that very fact in mind.[15]

**The Second Damage Award and Second Judgment**

At the conclusion of the additional hearing as to England and Australia, the trial court proceeded to make a revised damage finding without any record support whatever.

He fixed April 1, 1960, as the date Zenith could first have

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15. The foregoing are not the only examples of repudiation of testimony by these witnesses. At the recall hearing they were also forced to admit that their testimony at the original trial about Zenith's purported efforts to enter the English television market during the 1959-1963 period was wholly without basis in fact (see pp. 31-39, *infra*).

entered the Australian market, and left June 1, 1959, as the start of the damage period for England (A. 3525-26). He then stated that in his opinion Zenith would and should have been satisfied during the first year "with not incurring a loss" and that there could, therefore, be no lost profits or damages in either country for the first year following the lifting of the government import restrictions. For the succeeding years, he arbitrarily selected percentages to be applied to the unbelievable and "unrealistic" figures in the DX 220 "guesstimate," (A. 3526) which Zenith's witnesses had themselves *repudiated*. All of these assumptions were without record support.

At the conclusion of his oral ruling, the court added:

> "The record I want to indicate at this time—there has to be an end of litigation. I don't intend to permit a second chance to do the things that might have been done at the first trial. . . .
>
> "Then, whatever occurs from now on, I hope will occur on the 27th floor of this building [where the Court of Appeals sits] and not on the 21st floor" (A. 3527).

On December 13, 1965, Hazeltine Research made further extensive offers of proof dealing with the question of damages in England and Australia (A. 3550-4129), reminding the trial judge that in August he had ruled he would reopen the proofs for such evidence if the embargoes were established (A. 3540-44).[16] The trial judge's compelling desire to bring the litigation to an end in his court was underlined by the comment that: "This, in my opinion, is something

16. This evidence was assembled in preparation for the limited retrial on Australia and England (see A. 3089-91; 3113-14). Because the court below had refused to delay entry of the Canadian judgment, Hazeltine Research had no opportunity to offer similar economic evidence for Canada.

that should have been offered at the original trial" (A. 3541).

The trial judge then entered an Amendment to Finding XXXVI (A. 3537) based on his arbitrary formula (A. 3534-35) and entered a form of judgment submitted by Zenith against Hazeltine Research and Hazeltine Corporation, granting treble damages amounting to $15,919,458 as to England and Australia (A. 3539).

In addition to the fact that there was no record basis for the reduced judgment which was finally entered, the trial judge by his action recognized that Zenith's witnesses had misled him into an error of almost $14 million, for under the original findings the judgment as to England and Australia would have been $29,824,443 (A. 2908).

Zenith took no appeal from the rulings of the court that the government import restrictions found to exist in England and Australia, and nothing else, had kept Zenith out of those countries, or from the ruling of the trial court which struck almost $14,000,000 from the judgment as submitted by Zenith under the original finding.

Accordingly, after the second trial and entry of the second judgment, the judgments against Hazeltine Research and Hazeltine Corporation, which were reviewed by the Court of Appeals, consisted of:

(1) The judgment of April 5, 1965, in the amount of $19,042,173 which included $18,892,173 for alleged damages as to the Canadian market and $150,000 for alleged damages with respect to Hazeltine Research's domestic patent activities (A. 3078-80); and

(2) The judgment of December 13, 1965, in the amount of $15,919,458 for alleged damages with respect to the English and Australian markets (A. 3539);

all of which totalled $34,961,631.

## The Appeal

On appeal, Hazeltine Research raised a number of issues, attacking the treble damage judgments, the injunctive decree, and the trial court's holding on the domestic patent questions.[17] The appeals were exhaustively briefed by Hazeltine Research and Zenith, the briefs totaling over 450 pages, and there was oral argument involving an entire court day, pursuant to order of the Court of Appeals.

On December 13, 1967, the Court of Appeals entered its judgment order (A. 4236-37). By that order the judgments against Hazeltine Corporation were vacated in their entirety for want of jurisdiction over its person. As to Hazeltine Research, the judgment on Zenith's counterclaim in the amount of $34,811,631 was reversed, and the injunction based on its alleged antitrust violations with respect to foreign patents was stricken. The District Court judgment as to invalidity of Hazeltine Research's patent in suit was affirmed, as was the judgment for $150,000 with respect to licensing offers under Hazeltine Research's domestic patents, but the injunction with respect to patent misuse by Hazeltine Research was modified.

In its opinion (A. 4238-63), the Court of Appeals held "that Zenith failed to sustain the burden of proving the essential fact of damage in the relevant period" (*i.e.*, June 1959 - May 1963), and that although there was "some slight evidence" of the fact of damage as to Canada, the court concluded that the trial court's finding of the fact of damage was "clearly erroneous" as to all three countries. It stated that accordingly "we need pass on no other conten-

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17. In addition, on the ground of lack of jurisdiction, Hazeltine Corporation filed motions attacking the entry of the two judgments as to it, which motions were by order of the Court of Appeals taken with the rest of the case.

tion, therefore, in reversing the judgment on the counterclaim" (A. 4254). Contrary to Zenith's implications, the Court of Appeals did not rule on the legality or illegality of the "pools," or on any other question. Thus, the sole issue presented to this Court as to the treble damage judgment is whether the Court of Appeals erred in concluding that on the entire record, as a matter of fact, the trial court's finding that Zenith was damaged during the relevant four-year period by patent pools in England, Canada and Australia was clearly erroneous.

## II. THE FACTS AS TO ENGLAND

Zenith's statement as to England omits substantially all the relevant facts. We will, therefore, summarize the record with respect to each aspect of Zenith's claim as to England, considering both the evidence at the original trial and the later revelations of fact brought out at the subsequent hearings.

### A. The Claim That the Pool Kept Zenith Out of England "For Years" Prior to June 1, 1959

As we pointed out above (pp. 8-9, *supra*), Zenith asserted that the British pool refused to issue patent licenses on imported sets, and that "[f]or years" Zenith tried to export to England but on "each occasion" when Zenith attempted to export, the pool "threatened its distributors until they ceased buying Zenith products" (Finding XXI, A. 2901), so that through such suits and threats of suit, the pool had prevented Zenith from building up its English market for radio and television sets prior to June 1, 1959.

The trial judge himself destroyed this contention when he later held that it was the "iron curtain" of the British governmental embargo *"and nothing else"* which kept

Zenith from exporting radio and television sets to England from World War II until June 8, 1959 (pp. 16-17, *supra*). Moreover, an examination of Zenith's evidence *even at the original trial* shows that it did not support the original findings.

As to alleged refusals to license, Zenith put in evidence some letters relating to the refusals of the British patent pool to license Zenith radio receivers for sale in England (DX 102-08, A. 1518-44), but all that correspondence was *dated in the 1930's*, and there was no such correspondence since World War II. Even in this Court Zenith pursues the same device which it used successfully in the trial court, but unsuccessfully in the Court of Appeals, and that is to refer to ancient documents as though they constitute recent expressions of pool policy, without revealing their ancient date. For example, on pages 33-34 of its brief Zenith quotes from a letter from R. A. Rothermel, Ltd. to Zenith as indicating current practices, failing to point out that the letter is *dated December 7, 1934* (DX 101A, A. 1517). And at page 34 it quotes at length, again without date, from a letter from J. Toubkin, a Zenith distributor, to Zenith, which letter is *dated September 13, 1937* (DX 108, A. 1542).

There was no testimony that Zenith had requested a license, the only testimony being by Wright who said he had a conversation in 1955 with an officer of a member of the British pool, who assertedly told Wright he did not believe the pool's policy with respect to imports would be modified (A. 462-63). Wright did not testify that he requested a license, and in fact the British governmental embargo was still in effect, so that if Wright had any such meeting, any discussion of a license would have been academic.

As to suits or threats of suit, Zenith put in no documentary evidence of any suit ever filed against a Zenith distributor at any time. Again, the only documentary evidence was correspondence tending to show that an English distributor had cancelled orders and had apparently stopped handling Zenith products because of pool threats back *in the 1930's* (DX 104, A. 1530, 1532; see also DX 102, A. 1518-22). The post-World War II correspondence between Zenith and its English distributor (DX 112, A. 1559-93), and with potential distributors or persons interested in Zenith's products in England (DX 113, A. 1594-1606) makes no mention of the British patent pool. Wright admitted on cross-examination, that he knew of no suits or threats of suit *since World War II,* and that there had been none against the English distributor Ramsay, appointed in 1959, who imported and sold Zenith radios (A. 473-74).

In spite of these facts, Zenith repeats the assertion that "throughout the years Zenith made many efforts to enter the English market" and that "[o]n each occasion, however, the Pool threatened its distributors so they ceased buying Zenith products" (Z. Br. 33). But Zenith knows full well that the embargo blocked its imports into England from the beginning of World War II until June 8, 1959, and that the distributor which it appointed after the lifting of the embargo has not been threatened and has not ceased buying Zenith's products.

### B. The Claim That Zenith Tried to Market Television Sets During 1959-1963

The second aspect of Zenith's claim had to do with Zenith's alleged attempts to export television sets to the English market during the 1959-1963 period, after Ramsay had been appointed as distributor. A detailed analysis of the evidence at the trial, and of the disclosures of the truth

at the later hearings, including the repudiation by the Zenith witnesses of their earlier testimony, provides another illustration of the complete lack of credibility of the Zenith witnesses.

**1. The Differences in Broadcast Systems**

The record shows there were a number of significant differences between television receiving sets equipped to receive television signals in the United States, and television sets equipped for reception in England (Kaplan, A. 541). One of the most significant was in the number of horizontal "scanning lines" which appear in each "frame" or television picture. The United States has used and now uses a system which involves 525 lines (A. 3169-70). A number of other countries outside of North America use a 625-line system, sometimes referred to as the "CCIR" system (A. 3476, 3500, 3169). England, however, beginning with its first television transmission in the 1930's has used a 405-line system (A. 541, 3476). While later one of the three channels broadcasting in England began using the 625-line system, only the 405-line system was in regular use in England during the June 1, 1959 to May 31, 1963 period (A. 3475-76). During that period it was publicly known that the British government was giving consideration to the adoption of the 625-line system (DX 112, A. 1561-63) and late in the period (September, 1962) limited *test* transmissions were started (DX 112, A. 1590-91).

Television sets equipped for one system will not receive a picture or "signal" transmitted over another system, without changes. As Wright admitted, a set equipped for the United States' system would not receive 405-line transmission (A. 464) and unless equipped to receive 405-line transmission was not marketable in the United Kingdom.

At the original trial the Zenith witnesses minimized these differences and testified that conversion of an American set to receive the British television signal was a simple matter which had been done by the distributor "in his back room" with the aid of kits sent to him by Zenith. They also flatly stated that the distributor had attempted to market such sets. The facts brought out later showed that this was not true.

**2. The Testimony at the Original Trial**

At the original trial, Wright testified as follows on direct examination:

> "Q. All right. Have you made any effort at all to go into the English market with television?
>
> A. *Well, we have only sent a very few television receivers to Mr. Ramsay, which he has attempted to market.* But we have not made any effort on television because we were informed that the pool license then in effect, and the one currently in effect, would not permit that, and there was no possibility of getting such a license.
>
> THE COURT: Since you were a manufacturer here, you couldn't sell any, could you?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: Would it function?
>
> THE WITNESS: Well, yes, sir. Sometimes *we have to make minor* modifications in these sets. They use a *slightly* different system in England.
>
> THE COURT: That's what I mean.
>
> THE WITNESS: But these are modifications that aren't too difficult, ordinarily. It is just like having another model on the line. I believe in England they have a different number of lines, and they use AM

sound instead of FM sound, but these are modifications. We have the same situation—

THE COURT: I mean one off your line here wouldn't function in England.

THE WITNESS: No, sir.

BY MR. McCONNELL:

Q. You could set up a line that would?

A. *Oh, Mr. Ramsay in the back room of his little establishment could make the simple repairs and alterations that are necessary to make this work. We supply him with parts and kits to do that at times*" (A. 464).

Also at the original trial, Kaplan testified as follows on direct examination:

"Q. Well, let me ask you this, haven't you *actually* made sets at Zenith *that can be used in the British market*?

A. Yes, we have.

Q. I mean television and radios.

A. That is right" (A. 531).

On cross-examination at the original trial, Kaplan said:

"Q. Now, when we talk about Britain and Australia, Britain particularly, you do know that Britain has five different standards of transmission, five hundred and twenty-five lines.

A. No, they are 405 (A. 541).

. . . .

Q. . . . Now, it is my information that if you are going to scan at 525 lines or 405 lines, you need a different kind of scanning system. It has different numbers in it.

A. Mr. Dodds, I would like to answer by saying that this difference *is so profound* that *our distributor* changes them in his back room" (A. 545).

Taken at face value, this testimony creates the impression that:

1) Zenith had sent television sets equipped to receive the 405-line English transmission to the English distributor Ramsay for sale;

2) Conversion of an American 525-line set to receive the British 405-line transmission was "simple," could be done in the distributor's "back room" and Zenith had sent Ramsay "parts and kits" to make such conversion;

3) Ramsay had made conversions of the American sets to receive the 405-line transmission; and

4) Ramsay had attempted to sell some sets equipped to receive 405-line transmission.

Thereafter the court entered Finding XXII (A. 2901-02), submitted by Zenith, which stated in part that the patent pool had kept Zenith out of England although:

". . . *Zenith has successfully engineered sets for the British market and has shipped some to its English distributor* with the hope that the injunctive relief sought in this suit would be granted and business on a commercial scale could be conducted" (A. 2902).

That the court was influenced by the above testimony is also shown by the following excerpt during the recall cross-examination of Kaplan:

"Q. . . . You also told the Court that your English distributor had converted sets for use in England in its back room, did you not?

A. That was my impression, that is right.

Q. That was your testimony, was it not?

THE COURT: I mean, somebody said that because I remember that. I don't know who it was, but I know that I heard it" (A. 3472).

The statement of Zenith's counsel at the original trial shows that this impression was intentionally created:

"MR. McCONNELL: Wait a minute. If you are going to summarize the testimony, *it was also testified by Mr. Kaplan that all the changes that were necessary to be made, the distributor could make in a back room with a screwdriver*" (A. 758).

It must be assumed that Zenith's counsel thought his statement quoted above was a fair summary of the testimony of the Zenith witnesses and indeed it had impressed the trial judge as such (A. 3034, 3472). The Court of Appeals also referred to this testimony concerning ease of conversion "with a screwdriver," but despite its counsel's summary Zenith has the temerity to chide the Court of Appeals because it referred to the "screwdriver" story (Z. Br. 86).

### 3. The Facts Disclosed on Recall

Subsequent to the entry of the original findings, and before Wright and Kaplan were recalled, Hazeltine Research took the deposition of the English distributor Ramsay in London. This testimony disclosed that: (1) Zenith had *never sent* any 405-line sets to Ramsay (A. 3790, 3818); (2) Zenith had *never sent* Ramsay any parts, kits or instructions for converting a 525-line set to the 405-line system (A. 3790); (3) during the 1959-1963 period, Ramsay had *never converted* a single Zenith set to the 405-line system (A. 3788-90), and the only set he had ever converted to the 405-line system was for his own personal use

and was converted after the Wright and Kaplan testimony[18] (A. 3790); (4) Ramsay had *never attempted to market* a 405-line set in England (A. 3790, 3818); and (5) the only conversion material which had been sent over had to do with the conversion of Zenith's 525-line set to the 625-line standard (A. 3788-90).

Zenith was, of course, aware of this discovery when Wright and Kaplan were later recalled to testify in November, 1965.[19] On recall Wright admitted that:

(a) *No television set sent by Zenith to its English distributor was equipped to receive the then-standard British 405-line transmission.*

> "Q. Well, referring back to your testimony about 'We have only sent a very few television receivers to Mr. Ramsay, which he has attempted to market,' *did Zenith in fact send* to Mr. Ramsay during the period from June 1, 1959, to June 1, 1963, any television sets which were usable to receive commercial broadcasts in England?
>
> A. We sent many television receivers during that period of time. *I do not believe* that those receivers had been converted to receive the 405-line transmissions that were the *principal* commercial broadcasts in England at that time" (Wright recall, A. 3498).

(b) *All sets shipped were ordinary television receivers made to United States standards.*

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18. Wright and Kaplan testified on February 19, 1964. At his deposition on September 15, 1965 (A. 3759), Ramsay said that the conversion of the set for his personal use had taken place "a few months ago," he believed in 1965 or 1964 (A. 3790).

19. This discovery was ultimately included in Hazeltine Research's offer of proof, but in any event it was known to the Zenith witnesses when they were recalled.

"Q. What do you believe they were equipped to receive?

A. Well, they were—it is my understanding *now*, and I did not read the shipping tickets or the orders on these sets to know what was done with them, that these were *ordinary television receivers* which are made to our *U.S.. standards*" (Wright recall, A. 3498-99).

(c) *When he testified originally that sets had been sent by Zenith to Ramsay which Ramsay had attempted to market, Wright, in fact, did not know whether those sets were equipped to receive the English television signal.*

"Q. In other words, *when you testified* back in—you told the Court back in February of 1964 that Zenith had sent a few television sets to Mr. Ramsay which he had attempted to market, *you did not know* whether or not those sets were equipped to receive English television?

A. *No, sir, I did not*" (Wright recall, A. 3499).

(d) *Wright, in fact, did not know whether the English distributor had attempted to market Zenith television sets.*

"Q. Well, *when you told the Court* that Mr. Ramsay had attempted to market these sets, *did you know* whether or not he did in fact attempt to market them?

• • •

A. *I didn't know* specifically what he had done" (Wright recall, A. 3500).

(e) *No kits or parts were sent to Ramsay for conversion of television sets to receive 405-line transmission.*

"A. We were testifying about a lot of different things, but when I testified specifically about our sending him parts and kits to modify sets, *the only thing I knew of* and what I meant at the time were the things

necessary to add long wave to *radio sets*" (Wright recall, A. 3503).

Wright's attempt to escape from his previous testimony by referring to "long wave to *radio sets*" casts further doubt on his credibility because his original testimony (set out at pp. 33-34, *supra*) expressly concerned television and he was later forced to admit that it did (A. 3503).

(f) ***Wright, in fact, did not know whether or not Ramsay had converted a Zenith set to the British 405-line standard.***

"Q. Well, do you know, sir, did Mr. Ramsay ever, during this four-year damage period, ever convert a Zenith set to the 405 line standard?

A. *I don't* of my own personal knowledge *know* whether he did or not" (Wright recall, A. 3503).

Kaplan similarily retreated from his previous unequivocal statements. As to whether Zenith ever sent Ramsay "any television sets which had been converted to receive the 405-line transmission," Kaplan's answer was "I don't know" (A. 3472). In 1964 he had testified unequivocally that Zenith "actually made sets . . . that can be used in the British market" (A. 531). Further, as to whether Zenith had ever sent Ramsay any kits or instructions for the conversion of the American 525-line sets to the English 405-line system, his answer was "I don't know," and as to whether Ramsay had ever converted sets to the 405-line system, he stated "it was my *impression* that they had" (A. 3475). This is the same man who testified unequivocally at the original trial that Ramsay had converted the sets "in his back room" (A. 545; see pp. 34-35, *supra*).

It was primarily on the basis of the testimony of these witnesses that the trial court had entered Zenith's finding

calling for an award of damages of $8,079,859, before trebling, as to English television (Finding XXXVI, A. 2908).

### C. The Real Reason Zenith Did Not Try To Market Television Sets in England

The record shows that the reason Zenith made no attempt to ship television sets to England during the 1959-1963 period was that it was *waiting for a change* in the British transmission standards from the 405-line system to the 625-line CCIR system. Zenith does not deny this fact. Rather, it attempts to hide behind the untrue assertion that this evidence is found only in an offer of proof (Z. Br. 86). On the contrary, proof of this fact is contained in Zenith's own records, put in evidence as part of Zenith's Bulk Exhibit No. 112 (A. 1559-93).

The question of a change from the unique English 405-line system to the 625-line system had been pending and was expected by the trade for several years (see A. 1562-63). It was announced in mid-1962 that a new television channel of the BBC would employ 625-line transmission instead of the 405-line transmission then used by the BBC and the commercial channel (A. 1562-63, 1571, 1591).[20] The first test transmissions of the 625-line signals began in late summer or early fall of 1962 (see A. 1561-63, 1591), but regular broadcasting did not commence until after the close of the four-year period (Kaplan, A. 3471, 3475-76).[21]

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20. Zenith had exported 625-line sets or knock-down kits for local assembly to other countries including some on the continent of Europe (A. 3484-85).

21. Contrary to expectations (A. 1566-67), even after the 625-line system came into regular use on the one British channel (BBC 2), there has been no market in England for a television set which would receive only 625-line transmission because BBC 2 broadcasts only for limited periods during the day and does not reach all of

That Zenith was delaying entry into English television because it was awaiting the change in the transmission system is shown by a series of letters and telegrams in 1961 and 1962 between Zenith and Ramsay, the English distributor of Zenith products (DX 112, A. 1559-93). This correspondence does not mention the then-standard 405-line British television system. Instead, it shows that Zenith and the English distributor were *waiting for* England's expected change to the CCIR 625-line system. One of these letters very near the end of the period stated that fact unequivocally:

> "Nobody knows yet when the regular [625-line] transmissions will start and *until such time naturally we cannot start marketing . . .*" (Letter from Ramsay to Zenith, dated November 8, 1962, A. 1593).

Following are some pertinent excerpts from the correspondence:

> (a) *Zenith to Ramsay (September 14, 1961):*
>
> "The information in this letter and also the enclosed material will tend to deal with your *possibly* introducing Zenith television in the United Kingdom, in the very near future. Although this information is of a very technical nature, I believe that some of the enclosed materials will be of some help to you.
>
> • • •
>
> Enclosed also is a copy of our latest 'CCIR' Conversion instruction data.
>
> • • •
>
> Once you have entered the television market, we shall be glad to convert a television receiver, or two, to operate on *your local CCIR standards*" (A. 1559-60).

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England. The two principal channels continue to use the 405-line system. To be salable, the sets must receive either 405- or both 405- and 625-line transmissions (Offer of Proof, A. 3597-98, 3604-05).

(b) *Ramsay to Zenith (March 28, 1962):*

"*Experimental transmissions* are definitely starting in July but the actual public transmissions will be known only after the report is published" (A. 1563).

(c) *Ramsay to Zenith (April 19, 1962):*

"We have now received from the B.B.C. a summary of proposed specification for the 625 line system in England and you will notice that it is intended to operate in the U.H.F. band.

* * *

I am sending you two copies of the proposed specification as well as two technical memorandums of the B.B.C. which may be of interest to your technical people but *what we are primarily concerned with is how difficult and complicated will be the conversion to your instruments to the proposed system*" (A. 1571).

(d) *Ramsay to Zenith (August 1, 1962):*

"This 625 business is a very great thing in England and I think we have a *fair* chance and as far as colour is concerned we have a very good chance.

* * *

Going back to the subject of T.V. sets it is quite clear now that if we want to do a real business of it *we must have a reasonably priced 19"*. As you know we took a sample of the K2108 and I would like to have your opinion whether it would be advisable to have a lower model to get the price down without making the conversion too difficult" (A. 1567).

(e) *Zenith to Ramsay (August 3, 1962):*

"As you know, we are very anxious to receive your report regarding the performance of the black and white television receivers you now have on hand. This is the first and most important point, since we cannot proceed to convert *any* of the present television receivers until we have a definite answer from you as to performance, channel overlapping, etc." (A. 1568-69).

(f) *Ramsay to Zenith (August 3, 1962):*

"I confirm my cable of today in which I asked you to go ahead with the conversions on the T.V. sets at the cost quoted.

* * * *

In any case I believe that *very shortly you will be sending us conversion instructions to the British CCIR* [625-line] *system which we have not received yet"* (A. 1587-88).

(g) *Zenith to Ramsay (August 7, 1962):*

"Regarding the conversion instructions for the British CCIR [625-line] system, these are presently in the works, but *are not* expected to become *available for several weeks,* at least until some definite answers are known to us" (A. 1579).

(h) *Ramsay to Zenith (September 28, 1962):*

"I am taking this opportunity to mention that the B.B.C. have *now started the tests* but they are only putting on a test card and sound and generally I would say that the sets are well converted although some of them may need very slight adjustment which is understandable" (A. 1591).

(i) *Ramsay to Zenith (November 8, 1962):*

*"Nobody knows yet when the regular transmissions will start and until such time naturally we cannot start marketing* but we are getting acquainted more and more with the T.V. business and the servicing side. In fact, we are getting all the test instruments from you next week" (A. 1593).

By not even mentioning the patent pools, this correspondence reflects a total lack of concern for the pool or any possible threat or suit by it. It also shows that as late as November 1962, Zenith and the English distributor were waiting for the adoption of the CCIR 625-line system in England and that they had no intention of entering the

British television market except with the 625-line set for which there was as yet no market (A. 4257).

### D. The Claim That Zenith Could Not Obtain A License to Import

Zenith could have obtained a license from the British pool to import into England at any time during the four-year period, if it had wanted one.

As pointed out above, Zenith had *not requested a license* from the British pool since before World War II (A. 1518-45) and the only subsequent inquiry made of anyone who could be said to be connected with the pool was in 1955 when the embargo was still in effect (Wright, A. 461-63). Thus, Zenith's contention that the pool would not grant it a license to import during the four-year period rests solely on Zenith's interpretation of the pool agreement and the pool license forms themselves (embodied in the Zenith prepared Finding XVI, A. 2900). However, *changes* had been made in both these documents *after* Zenith's last inquiry to permit licenses without a prohibition against imports.

*The pool agreement.* The "pool agreement" is the contract among the members of the pool setting up the pool. That agreement for the period from January 1, 1953 to December 31, 1957 (DX 58, A. 1248-70), contained the following provision:

> "7. Unless otherwise agreed no licenses are hereby agreed to be granted to import Radio Apparatus[22] into the United Kingdom . . ." (A. 1258).

22. "Radio Apparatus" was defined to include television sets (A. 1256).

It also contained the following provision relating to the granting of licenses by individual pool members:

> "18. No licenses shall be granted by any party hereto for Radio Apparatus in the British Isles in respect of the period from 1st January 1953 to 31st December 1957 except in accordance with the decisions of the Committee or in the cases mentioned in Clause 11 (c) (i) (ii) and Recital No. . . ." (A. 1267).

By letter dated September 23, 1957, this agreement was extended to June 30, 1960 (DX 59, A. 1271). However, in the next extension, from July 1, 1960 to June 30, 1964, (DX 60, A. 1272-76), paragraph 7 was expressly *deleted* (A. 1273) and paragraph 18 was amended to add "or for imports of such apparatus" (A. 1275). Thus, in pertinent part, paragraph 18 was changed to read:

> "No licenses shall be granted by any party hereto for Radio Apparatus in the British Isles . . . except . . . for imports of such apparatus."

The net result was that effective July 1, 1960, the agreement not to license imports and the provision prohibiting individual members from granting a license for imports were eliminated, and the individual members expressly retained the right to grant licenses under their respective patents "for imports of such apparatus."

*The license form.* The "license form" is the printed form used by the pool in issuing licenses. Form A7-T (DX 68, A. 1356-67), having a term of January 1, 1953 through December 31, 1957, contained the following provision:

> "4. The Licensee agrees with the Grantors as follows:
>
> (a) Not without the previous written consent of the Grantors to sell within the said territory any Television Receiver which has not been manufac-

tured in the territory for which this License is granted" (A. 1360).

However, the form expiring December 31, 1957 is the *last* license form to contain that provision. In the next printed license form (DX 71, A. 1391-1401) having a term of July 1, 1960 through June 30, 1964, *this paragraph was eliminated* (A. 1395). Moreover, plaintiff's Offer of Proof shows that this paragraph had previously been deleted from existing licenses and the change of policy announced by letter *effective January 1, 1958* (Offer of Proof, Dale-Harris, A. 3701-06).[23]

Zenith's finding (XVI, A. 2900) adopted by the trial court completely ignores these changes in the agreement and license, which are shown in Zenith's own exhibits (DX 60, A. 1272; DX 71, A. 1391).

**E. The Claim That Zenith Suffered Injury As To Radio**

The record shows Zenith admitted that after 1957, its imports of radios into England were in no way interfered with by the pool, and the trial court so found (Finding XXII, A. 2901-02). Nevertheless, after the original trial the trial court adopted Zenith's finding that Zenith's radio business in England had been "damaged" by the pool during the four-year period in the amount of $1,169,067 (Finding XXXVI, A. 2908).[24] We shall discuss the factual

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23. The stipulation on the settlement of the RCA case was entered September 27, 1957 (PX 43, A. 2751), and the letters to pool licensees eliminating paragraph 4(a) from their licenses were mailed in November, 1957 (Offer of Proof, Dale-Harris, A. 3701-06). While there was no change in the renewal of the pool agreement dated September 23, 1957 (just before the RCA settlement), the very next renewal covering the period commencing July 1, 1960, contained the changes mentioned above (DX 60, A. 1272-76).

24. Later reduced to $745,102 (A. 3537).

situation as concerns radios in the Argument (pp. 93-95, *infra*) when we discuss Zenith's attempt to justify the recovery.

## III. THE FACTS AS TO CANADA

### A. The RCA-Zenith Settlement

Any consideration of the facts concerning Zenith's claim as to Canada should start with the settlement in September 1957, of Zenith's case against RCA, General Electric, and Western Electric. That settlement is the first of several important cutoff dates applying to Zenith's claim, for in that settlement Zenith was fully compensated for everything which went before, and expressly released not only past damages but all damages which might result in the future from acts which occurred *prior* to the settlement (A. 3051-52).

The RCA-Zenith case, entitled *RCA* v. *The Rauland Corp. and Zenith Radio Corp.*,[25] involved Zenith and its subsidiary Rauland on the one hand and RCA, General Electric, and Western Electric on the other. RCA had sued for patent infringement and Zenith had counterclaimed, charging patent infringement and also charging RCA and the other two companies, brought in as cross-defendants, with involvement in an alleged conspiracy by reason of participation in patent pools in Canada, England, and Australia, and asserting the right to recover treble the damages allegedly caused by acts performed pursuant to the alleged conspiracy (PX 38-43, A. 2697-2752).

In September 1957, that litigation was settled without trial. Contrary to Zenith's assertions (Z. Br. 75), no

25. Civil Action No. 48 C 1818 in the District Court for the Northern District of Illinois, Eastern Division.

"admissions" were made by anyone (PX 48, A. 2783). It was agreed that general releases would be exchanged, that Zenith would receive a cash payment spread over a period of ten years, that the pending infringement claims of Zenith and RCA against each other would be arbitrated, and that RCA, General Electric, and Western Electric would grant world-wide royalty-free licenses to Zenith under their radio and television patents (excluding color) (PX 48, A. 2783).

Pursuant to this agreement, Zenith executed general releases under date of September 27, 1957 (the form appears as a part of Hazeltine Research's pleading, A. 3051-3052). By the explicit terms of the release, Zenith released:

> ". . . all manner of action and actions, cause and causes of action . . . damages [etc.] . . . which . . . Zenith . . . ever had, now has or . . . *hereafter can, shall or may have* for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents . . ." (A. 3051-52).

Zenith has taken the position in the present litigation that Hazeltine Research, and its parent for whose acts Hazeltine Research agreed to stand liable, were co-conspirators in the alleged conspiracy or conspiracies charged in the RCA-Zenith case, and that the same conspiracies are the basis of its claim in the present case.[26] Accordingly, Hazel-

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26. See Finding XIX (A. 2901), Finding XXII (A. 2901-02) and Finding XXX (A. 2905-06), which specifically mention the RCA litigation, and see Zenith's pre-trial and post-trial briefs on the antitrust issues: "The *same* conspiracy was the subject of a private treble damage action in this court brought in the form of a counterclaim filed by Zenith in a patent infringement action, similar to this suit, RCA v. Zenith and Rauland Corporation, 48 C 1818" (A. 3070, pp. 42-43 of post-trial brief). See McConnell: opening statement (A. 121-25); during trial (A. 159-60); and closing argument (A. 831-34, 839-40, 849-50, 857, 886); see also Z. Br. 7-9.

tine Research and its parent are entitled to the benefit of the general releases given by Zenith to their alleged joint tort-feasors in the *RCA* case and Zenith's counsel so stated (A. 3035). Contrary to Zenith's brief (Z. Br. 75), Hazeltine Research has never agreed, rather denies, that it or its parent has in fact been a co-conspirator as contended by Zenith. We have pointed out only that since Zenith's claim is based on the charge of co-conspiracy the releases necessarily apply to all alleged co-conspirators or alleged joint tort-feasors, a principle of law which Zenith concedes (see p. 122, *infra*).

In addition to providing an important cutoff date for purposes of considering the evidence, the settlement is significant because of the world-wide licenses granted as a part of the settlement by RCA, General Electric, and Western Electric to Zenith (see Finding XXII, A. 2901-02). Zenith considered that these licenses and other direct licenses which had been granted to Zenith made its products "fully licensed to the extent that they employ any patents administered by Canadian Radio Patents Limited," the Canadian pool (DX 138, A. 1879).

### B. The Evidence After the RCA-Zenith Settlement

Almost all the evidence which Zenith relies on as allegedly showing damage to its Canadian exports, relates to events which occurred prior to the September 27, 1957 releases given in the *RCA* case settlement.

Indeed, at least 72 of the exhibits which Zenith introduced in this case had been marked as deposition exhibits in the *RCA* case and many were dated in the 1930's, 1940's, and

even some in the 1920's.[27]

Wright testified that commencing as early as 1927, the patent pool refused to grant Zenith a license permitting importation (A. 451-52); a letter dated November 30, 1936, from the pool informing Zenith that it was not the policy to license imports was introduced (DX 148, A. 2005), and also an inquiry by Zenith to the pool and a reply in July 1953, advising that a license for imports would not be given (DX 150, A. 2012-14). However, the record contained no request by Zenith for a license after 1953.

To show interference by suits or threats of suits against Zenith dealers or distributors in Canada, Zenith introduced into evidence correspondence dated in 1951 (DX 155-58, A. 2022-28), and in 1954 (DX 161-62, A. 2033-46; see also Wright, A. 452-53). But there is *no* similar evidence of any threat against a Zenith distributor or dealer *after* the Zenith-RCA 1957 settlement.

The record shows that following the September 1957 settlement and the receipt by Zenith of the world-wide licenses from the parties to the *RCA* case, Zenith made plans to enter, and successfully entered, the Canadian market. It extensively advertised and promoted its products in Canada (A. 4259, 3459; DX 218, A. 2642; see also

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27. See, *e.g.*, DX 111, A. 1557; DX 117, A. 1637; DX 162A, dated May 22, 1928, A. 2047; DX 162B, A. 2050; DX 162C, A. 2052; DX 162D, A. 2058, 2062-63, 2065 (5 different exhibits from the *RCA* case); DX 163, A. 2068; DX 164, A. 2070; DX 170, A. 2101; Defendant's Bulk Exhibit 179, A. 2152, 2157, 2159, 2161-63, 2165, 2167, 2170, 2174, 2175, 2177, 2180, 2182-83, 2185-86, 2188, 2190-91, 2193, 2196-97, 2202, 2204, 2207, 2210, 2212, 2215, 2217, 2221, 2224, 2226, 2229, 2233, 2235, 2244, 2246, 2249, 2251, 2253, 2256, 2261, 2268, 2270, 2275, 2277, 2279, 2283, 2287, 2291, 2293, 2295, 2298, 2301 (54 separate *RCA* case exhibits); DX 213, A. 2513; DX 214, A. 2519. See also DX 122, A. 1691; DX 135, A. 1870; and DX 157, A. 2027, which appear to have been deposition exhibits in that case.

pp. 54, 111-12, *infra*). As a result, in the four-year period involved here (June 1, 1959 through May 31, 1963), Zenith exported to Canada and sold more than 65,000 radios and nearly 60,000 television sets in Canada (A. 4258; DX 220, A. 2661), and its share of the Canadian market steadily increased to a high of about 5 per cent of the market (DX 218, A. 2632) before the Canadian government increased the tariff and changed the exchange ratio which "presented serious obstacles" to Zenith's Canadian business (PX 62, A. 2850). Despite the extensive importation, advertising and sales, no suit was brought or threat made against any Canadian distributor or dealer of Zenith products in that four-year period.

There were only two incidents involving Zenith and the Canadian pool which occurred after the September 27, 1957 settlement, and, as we point out in more detail in the argument (see pp. 101-05, *infra*), neither had any effect whatsoever on Zenith's sales in Canada, which continued to increase. The first involved an advertisement of the Canadian pool which appeared in the August 1958 issue of a Canadian trade publication known as the "Trade Builder." The advertisement advised "importers, vendors, purchasers or users of radio and television receivers" that the pool would hold them liable for patent infringement if they were importing, selling or using unlicensed infringing receivers (DX 138, A. 1880).

Wright promptly sent a telegram to the pool demanding that such "advertisement"[28] be terminated and stating that it was detrimental to Zenith and that Zenith's "products are *fully licensed* to the extent that they employ any patents

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28. Zenith is critical of the Court of Appeals' use of the term "advertisement" (Z. Br. 64), but that is the term used by Wright in both his testimony (A. 450, 452, 471-72) and his telegram (A. 1878) and letter (A. 1882) to the pool.

administered by Canadian Radio Patents Limited" (DX 138, A. 1879). He followed up with a letter again demanding that such advertisements be terminated and threatening suit if they were not (DX 138, A. 1882). Zenith says that the protest had no effect (Z. Br. 21), but the fact is that the pool, apparently acceding to Zenith's demand, never repeated such an advertisement. The repeated inference in Zenith's brief that these advertisements *continued* after August 1958 (Z. Br. 12, 14, 64) is not supported by anything in the record. Wright testified that this advertisement was typical of the advertisements which had regularly appeared "prior to 1957" (A. 452), but neither he nor anyone else ever testified that such an advertisement *appeared again* after his sharp protest to the pool.

Wright testified that following publication of this advertisement some of Zenith's Canadian dealers and distributors expressed concern (A. 472), but no such dealer or distributor was called to testify. Indeed, not one was even identified[29] and there is no documentary evidence indicating any concern by any Zenith dealer or distributor as a result of this 1958 advertisement. In any event, Wright did not testify that any dealer or distributor stopped handling Zenith's products, reduced its purchases of Zenith's products, or took any action as a result of this 1958 advertisement, and Wright acknowledged that there was no expression of concern after 1958 (A. 471-72).

The only other incident involving Zenith and the Canadian pool subsequent to the RCA settlement started in July 1958 with a meeting between executives of Zenith's Canadian subsidiary and McConnell of the Canadian pool, at which the pool sought information concerning Zenith's marketing plans in Canada and a diagram of its set (DX

29. The letter to the Motorola dealer, referred to by Zenith (Z. Br. 17), which is strong evidence Zenith dealers were *not* threatened, is discussed herein, pp. 108-09, *infra*.

151-52, A. 2014-18), and culminated in a meeting on May 12, 1959, in Chicago between McConnell of the pool and Crotty and Curtis, two of Zenith's lawyers (A. 392). According to Crotty, McConnell stated that Zenith was infringing certain patents administered by the pool, that Zenith would need a license, and that the license would have to be for manufacture in Canada (A. 410). Crotty requested McConnell to send him a pool license form which McConnell did on June 5, 1959 (DX 154, A. 2021), but there was no further contact between them and no evidence of any action at any time by the pool, despite Zenith's growing business. Zenith had thus successfully adhered to its position that it was licensed to the extent that its products "employ any patents administered by Canadian Radio Patents Limited" (A. 1879), and the pool made no threats and took no action.

There is a further fact which shows that Zenith was not injured by either of these matters occurring after the RCA settlement. Zenith's answer in this case was filed on April 7, 1960 (A. 14-19), long after the last of those matters had occurred. Yet, it filed no claim for damages with its answer. Three years later, when it sought leave to file a counterclaim to obtain damages, Zenith said both in its motion for leave to file the counterclaim (A. 62) and in the affidavit of Crotty (A. 63), its vice president and counsel of record and one of the very people involved in the May 12, 1959 meeting, that the acts which were the proximate cause of the damage claimed in the counterclaim occurred after the filing of the answer:

> "2. That matters alleged in paragraphs 6-9 of defendant's counterclaim, to which this affidavit is attached, and *which are the proximate cause of damages alleged* and require the relief sought in said counterclaim, *occurred after the filing of the answer herein*" (Crotty Affidavit, A. 63).

This statement, made by Zenith for the purpose of inducing the court to grant leave for it to file a counter-

claim three years after the answer was filed, not only establishes April 7, 1960 (the date of the answer) as a cutoff date as a matter of pleading, but also constitutes a judicial admission that the above referred to matters occurring subsequent to the RCA release but prior to the answer were *not* a proximate cause of damage to Zenith.

Having no evidence of any suits or threats against its Canadian distributors or dealers, or other actual interference with its imports into Canada after its answer or any time during the four-year period for which it ultimately claimed damages in this case, Zenith vaguely claimed that its alleged injury took the form of "clouds" and "uncertainties" which were the "residual effect" of the past acts of the pool (A. 457-58, 490). While Wright claimed that this "residual effect" influenced Zenith's "thinking" about what it was willing to spend on advertising (A. 490), the record showed that Zenith utilized a variety of advertising media in Canada, spending between 11 per cent and 13 per cent of its Canadian sales on advertising in 1960 (DX 218, A. 2642; A. 4259), which Kaplan said was what would be expected for a company "getting started into business in Canada" (A. 3459).

The only other alleged "residual effect" asserted by Wright was an alleged "feeling of uncertainty" among Zenith distributors and dealers (A. 490) and difficulty in getting distributors (A. 458). Yet, Zenith was unable to offer any correspondence or other documentary evidence of any dealer or distributor either refusing to handle its products or expressing concern for the patent pool within the 1958-1963 period, although such evidence for the period *prior to* the *RCA* case settlement was offered by Zenith (*e.g.*, DX 155-58, A. 2022-28, dated in 1951). In addition, as noted above, Wright could recall no expression of concern since 1958, and no dealer or distributor who cut down

his purchases or refused to handle Zenith's products after the 1957 settlement testified or was even identified by Zenith (see p. 52, *supra*).

### C. The Zenith Annual Reports 1957-1962

In connection with its motion to set aside the Antitrust Findings and Conclusions before entry of judgment, Hazeltine Research made an Offer of Proof of portions of Zenith's Annual Reports for the years 1957, 1958, 1959, 1960, and 1961 (A. 2961, 2990-95). The 1962 Report was already in evidence (PX 62, A. 725, 2847-54). The relevant pages of the other reports are reproduced in an appendix to this brief (Appendix A, A-1 to A-22) with brackets around the excerpts included in the offer of proof. Although the trial court refused to consider them, and the Court of Appeals apparently did not rely on them, we believe this Court may and should give consideration to these reports (see pp. 117-18, *infra*). These contemporaneous reports to Zenith's shareholders and the public disclose a practice by Zenith of reporting at length about the problems and adverse factors faced by Zenith in various foreign markets as well as reporting the progress or lack of progress being made in those markets. They are particularly relevant here because they give a history of Zenith's operations in Canada since 1957 which directly contradicts the testimony of Zenith's executives.

#### 1957 Annual Report

> "[Y]our Company is inaugurating an aggressive program to set up distribution of radio and television receivers in Canada, where *it had previously been excluded* from participation in the market *through the operation of a cartel.* Experienced and capable personnel have been employed and arrangements are being made for larger facilities in Toronto and Montreal.
>
> • • •

"It is anticipated that independent distributors will be appointed to handle the distribution of Zenith products in the other areas of Canada" (A. 2990-91).

This report, dated March 7, 1958 (Appendix A, A-5), thus takes note of the September 1957 settlement, and there was *never again* any reference to the Canadian "cartel" in any subsequent report, although they are full of reports on problems in various markets, including Canada.

**1958 Annual Report**

"Zenith Radio Corporation of Canada, previously engaged exclusively in the distribution of hearing aids in Canada, during the year *initiated the distribution of radio and television receivers* in the provinces of Ontario and Quebec. As a result, sales volume increased substantially, but the *expense of moving the operation* from Windsor to Toronto (with a new branch operation in Montreal) and the heavy starting costs in connection with the new distribution activities unfavorably affected earnings.

. . . .

"The *substantial increase in sales* noted above accomplished in a difficult export market does not include a significant volume of purchases of television and radio receivers and phonograph units by Canadian distributors during 1958. During the year, an aggressive sales and operating organization was added to the personnel of the Company's subsidiary, Zenith Radio Corporation of Canada, to initiate the distribution of radio and television receivers to dealers in the provinces of Ontario and Quebec. *Four outstanding and experienced independent distributors* were appointed to handle the distribution of Zenith products in western Canada. Although there has long been a strong consumer demand for Zenith products in Canada, much work had to be done to establish a dealer organization and the major benefits of Canadian distribution will begin to be felt in 1959" (A. 2991).

This report was published March 6, 1959, six months after the *Trade Builder* notice, but instead of reflecting any difficulties concerning distributors, the report is to the contrary saying that "outstanding and experienced" distributors were appointed and that a "significant volume" of purchases had been made by Canadian distributors. On the other hand, there is no hesitancy to report other problems of high "moving" and "starting" costs.

**1959 Annual Report**

"Zenith Radio Corporation of Canada made substantial progress during the year, but a continuation of the *heavy costs* in connection with the new radio and television receiver distribution activities unfavorably affected earnings.

* * *

"The Company's Canadian subsidiary, Zenith Radio Corporation of Canada Ltd., showed marked progress in the sales of all products. The long established Hearing Aid Division continued its steady growth in sales and profits. The Radio and Television Division, established in 1958, *doubled its sales* over the first year and in the closing months *achieved a substantial gain* in its percentage of industry sales despite a decline in over-all Canadian industry sales of television receivers. This gratifying performance emphasizes the *wide acceptance* of Zenith products by the Canadian trade and public.

*"Zenith now has a strong distribution network at both the wholesale and retail level throughout Canada, supported by powerful national and local advertising.*

"Our Canadian management is confident that Zenith sales and profits together with its percentage of industry sales will continue to rise throughout 1960" (A. 2992-93).

Other portions of this report (A. 2992-93) make reference to "severe foreign competition from Japan" as a

deterrent to exports and to "unfavorable trading factors and adverse conditions which exist in many major world markets," but it refers to no patent pool or alleged cartel in Canada. Instead, it reflects "marked progress" and "wide acceptance" of Zenith's products. Indeed, this report, published March 8, 1960, after the last contact between Zenith and the pool and after the instant suit was filed, directly contradicts Wright's vague statements about dealer and distributor uncertainties, difficulties in getting distributors, and curtailment of advertising.

**1960 Annual Report**

"Zenith Radio Corporation of Canada, Ltd., in 1960 *successfully countered the downward industry sales trend* (which began in Canada in 1955) and made *important gains* in the sale of Zenith television and radio receivers.

"The Company's Canadian management is confident that 1961 will see further increases in sales and profits and a rise in its share of industry sales, despite the possibility that total Canadian industry sales may continue to decline. *Plans are being readied for a manufacturing operation* in Canada *when* the Canadian subsidiary's annual unit *sales volume permits*" (A. 2994).

In other portions (A. 2993-94), this report recites a long list of difficulties in Zenith's exports, including "loss of Cuban sales," the problem of "new or more rigid import restrictions" in a number of foreign markets, "[c]ompetition from both U.S. and foreign manufacturers [which] was extremely severe in all major overseas markets," and the "advantage of low labor rates" enjoyed by foreign competitors. Yet, as concerns Zenith's Canadian experience, the report not only failed to mention any "clouds and difficulties," but, to the contrary, reflected that its Canadian opera-

tion had "successfully countered the downward industry sales trend" and "made important gains."

**1961 Annual Report**

"Profits of Zenith Radio Corporation of Canada Ltd. were *adversely affected* during the year by the *Canadian government's action* which put the Canadian dollar at a discount, rather than the premium position it had previously held, in relation to the U.S. dollar.

* * *

"Zenith Radio Corporation of Canada Ltd. made *gratifying progress* during the year, selling *more television receivers than in the two previous years combined. Consistent national advertising* and the *enthusiam of distributors and dealers* have created a growing demand for Zenith products in the Canadian market" (A. 2994-95).

Thus, in its 1961 report Zenith *did* report difficulties with its Canadian operation, but it attributed them to exchange control problems "which put the Canadian dollar at a discount," and not to any activities of the Canadian patent pool or any residual "clouds" or "uncertainties" (A. 457-58, 490). The reference to "[c]onsistent national advertising" and the "enthusiasm of distributors and dealers" exposes Wright's testimony as being sheer fiction.

In 1964, when on the witness stand and being pressed for some support for Zenith's claim that it was injured by the Canadian pool Wright vaguely claimed that Zenith held back on advertising and had trouble getting good distributors. Yet this 1961 Report and the previous reports show that in the actual period involved and before any counterclaim had been filed, Wright was telling Zenith's shareholders and the public just the opposite.

1962 Annual Report

"Profits of Zenith Radio Corporation of Canada Ltd. were again affected as a result of *curbs instituted by the Canadian Government.* Its action in establishing an exchange ratio which further discounted the Canadian dollar in relation to the U.S. dollar and the imposition of additional tariffs presented serious obstacles to the Canadian operation" (PX 62, A. 2850).

The 1962 Report again shows difficulties from curbs instituted by the Canadian government, but *not one word* concerning the Canadian pool.

These reports thus show the success Zenith was having in Canada, adversely affected only by government actions.

**D. The Domestic Patent Suit and Licensing Negotations**

Tacitly recognizing that it has no evidence that the Canadian pool actually did anything to interfere with its imports into Canada in the June 1, 1959 to May 31, 1963 period, and that its claims of residual effects are not supported by the record, Zenith reverts to the assertion (Z. Br. 22-24, 71-74) that the instant domestic patent suit brought by Hazeltine Research against Zenith and the licensing negotiations in connection with U.S. patents were overt acts pursuant to the alleged Canadian conspiracy which caused Zenith to curtail its Canadian activities.

Zenith's assertion that the instant suit was brought to carry out an alleged threat of the Canadian pool is based solely on the fact that Zenith's meeting with the Canadian pool was in May 1959 and this suit was brought by Hazeltine Research in November 1959. There is no testimony or other evidence connecting these wholly unrelated events. The instant suit arose out of a completely different series

of negotiations (see pp. 129-30, *infra*), and no witness testified that the pendency of the instant suit or the other domestic licensing negotiations had *any* effect on Zenith's Canadian sales or activities. Zenith itself at the trial made no attempt to prove any causal connection between these events, specifically indicating (A. 428) that the testimony concerning the U.S. patent licensing negotiations was "offered under the misuse theory" and "didn't have anything to do with the overall conspiracy," and both courts below agreed. All of the facts relating to this issue are more fully discussed in the Argument at pp. 124-33, *infra*.

### E. The Amount of Damages—Zenith's Exhibit 220

In our brief to the Court of Appeals, we pointed out a number of errors in the findings and holding of the trial court in relation to the amount of damages. However, in light of its ruling on the issue of the fact of damage, the Court of Appeals felt it unnecessary to go into or decide any of the number of issues raised relating to the amount of damage. Since the only matters before this Court are those which were decided by the Court of Appeals, we will not discuss in detail either the evidence on the amount of damage or the errors made by the trial court with respect to that issue. We will, however, discuss briefly some of the evidence and Zenith's theory with respect to the amount of damage in order to enable us, in the Argument, (1) to answer Zenith's contention that in effect this evidence on the amount of damage was evidence of the fact of damage, and (2) to show additional contradictions and inconsistencies in the testimony of Wright and Kaplan which have a bearing on the credibility of their testimony as to the entire case.

Wright and Kaplan testified that but for the activities of the Canadian pool going back many years, Zenith would

have had a share of the Canadian radio and television markets equal to its U.S. market share (Wright, A. 457, 3490; Kaplan, A. 3440, 3465). Accordingly, Zenith's damage exhibit, DX 220 (A. 2661), was prepared on the assumption that Zenith's share of the Canadian market starting June 1, 1959, and for the entire four-year period thereafter, would be exactly the same as its percentage share of the U.S. market.

Zenith's market share in the United States on June 1, 1959 had been built up over many years in the market. Zenith had been engaged in the manufacture and sale of radio receivers in the United States since at least the 1920's (A. 3468), and had entered the American television field in 1948 in its incipiency (A. 3495). Neither Wright nor Kaplan claimed that Zenith entering the market as it did in late 1958 could have expected to achieve the claimed 20 per cent share of the Canadian market by June 1, 1959. Instead, both testified that their assumption on Canada was that by June 1, 1959, but for the activities of the pool going back for many years, Zenith would have built up its market share and would have had a "full blown organization" (Kaplan, A. 3440, 3465; Wright, A. 3490-91).

Thus, as is more fully explained in the Argument, this testimony was based on the assumption that Zenith was entitled to recover for acts of the patent pool not only prior to its answer (April 7, 1960) and prior to the four-year statutory period, but also prior to the September 27, 1957 release. This testimony was not evidence that the pool had done anything after June 1, 1959 to interfere with Zenith's imports into Canada (see pp. 121-22, *infra*).

## IV. THE FACTS AS TO AUSTRALIA

In its Statement (Z. Br. 26-28, 35-36), Zenith makes no claim that the Australian pool refused to grant it a license

or brought infringement suits, made threats or otherwise took any action against Zenith or any distributor. Instead, it asserts only that the record shows that the pool had a policy against licensing imports and that this claimed policy kept Zenith from distributing its products in Australia (Z.Br. 36). The record evidence at the trial and during the additional hearings show that these assertions have no foundation.

## A. The Original Trial

The testimony offered by Zenith as to Australia was indeed sparse. In fact, its evidence consisted almost entirely of a number of documents (DX 180-215, A. 2305-2590). These included license agreements and blank license forms together with correspondence between Zenith and persons or companies in Australia (DX 215, A. 2523-90), but none of this correspondence was between Zenith and the Australian pool, and none of the documents evidenced any attempt by Zenith to get a license, or a refusal by the pool to give one to Zenith *at any time.*

Kaplan testified as to the market share Zenith claims it should have had in Australia[30] but he did not assert either that Zenith had tried to export or that the Australian pool had taken any action or made any threats against Zenith.

Wright, Zenith's president, did not even testify concerning Australia on direct examination. On cross-examination he said he could not recall any request for a license made by Zenith to the pool within the last twenty years (A. 476).[31] He further testified that (while he had talked with

30. Kaplan testified that he believed Zenith could have achieved in Australia a share of the market equal to 10% of the share of the market it achieved in the United States (A. 529-30).

31. Similarly, so far as Kaplan knew, no request for a license was ever made by Zenith to the pool (A. 540-41).

some people in Australia who told him they thought no license permitting imports was available, he had never talked with anybody connected with the pool concerning the availability of such a license (A. 476). When asked the date of the last time any Zenith dealer in Australia had been threatened by the pool, Wright stated that Zenith had not had a dealer there since the late 1920's or early 1930's (A. 474) and referred to being "thrown out of Australia in either the late twenties or the early thirties by the pool activity" (A. 475-76).

There is no finding by the trial court that Zenith had ever been denied a license, had ever attempted to obtain a license, or had ever been threatened or sued, nor is there any finding that the pool in any way affected Zenith's ability to get distributors in Australia. As the Court of Appeals pointed out, the trial court entered no finding "with regard to *how* the alleged conspiracy prevented sales by Zenith in Australia" (A. 4256).

Following the trial, Zenith proposed and the trial court adopted a finding (Finding XXXIV, A. 2907) that rights under "Hazeltine's inventions have been granted the Australian Pool . . . for 35 years and have been the subject of the *only form of license agreement issued by the Pool* . . . [which] requires the licensee to *agree not to export or import* or sell or offer for sale in Australia any radio or television receiving apparatus not manufactured in Australia" (A. 2907). Contrary to this finding prepared by Zenith, the record shows that the pool issued *two* kinds of licenses: one for manufacturers, each new edition of which bore an identification number; and one for local assemblers, each new edition of which bore the same number followed by the letter "B" (A. 804-06). For example,

the manufacturer's ("whole-numbered") license for the period July 1, 1953 through June 30, 1958 was labeled "License No. 6" (DX 193, A. 2438, 2441), and the local assembler's license for the same period was labeled "License No. 6B" (DX 194, A. 2452, 2456).

The "B" license forms (*i.e.*, for local assemblers) contain the following provision, obviously the one referred to in Finding XXXIV quoted from above:

> "4. The Licensee agrees with the Grantor as follows:
>
> . . .
>
> (b) Not without the previous written consent of the Grantor to sell or hire or offer or expose for sale or hire in the territory for which this License is granted any broadcast sound receiving apparatus or television receiving apparatus or radiogramophones which have not been manufactured in the territory for which this License is granted" (DX 194, A. 2452, 2457; DX 195, A. 2464, 2469; see also DX 191, A. 2412, 2416 which varies only slightly).

This same provision was in the whole-numbered licenses (*i.e.*, for manufacturers) *prior to 1951* (*e.g.*, DX 188, A. 2381, 2386; DX 189, A. 2395, 2400) but it was *deleted* from the whole-numbered licenses beginning with License No. 5 (DX 192, A. 2425), which had a term *commencing January 1, 1951* (A. 2428, 2430). See also License No. 6, which had a term of July 1, 1953 through June 30, 1958 (DX 193, A. 2438, 2441, 2443).

Zenith's statement of facts (Z. Br. 35-36) conveniently ignores these latter two licenses, both of which Zenith itself introduced into evidence, and asserts that the only proof that the import restriction was removed was contained in License No. 7, in effect beginning January 1, 1961, which

Hazeltine Research offered to prove in order to corroborate the absence of restriction and to complete the sequence of licenses available to Zenith during the four-year period (Offer of Proof, A. 2970-71, 2977). Proof that the restriction had been removed does not rest on this offer of proof because Licenses No. 5 and No. 6 put in evidence by Zenith had already established the removal of the import restriction from the manufacturer's license form. These licenses unequivocally contradict the trial court's findings in at least two respects: first, the pool did not grant only one form of license; and second, beginning in 1951, the pool did issue a license form without the requirement that the licensee agree not to import.

### B. The Later Hearings

As pointed out above, Hazeltine Research proved at the "embargo hearing" that an Australian Government embargo had barred the importation of American-made radio and television sets into Australia from World War II until 1960. The trial court found that these governmental restrictions, "and nothing else," prevented Zenith from importing radio and television sets into Australia until April 1960 (A. 3205). Thus, Zenith's claim that the patent pool had kept it from importing for thirty-five years was exposed as untrue.

Moreover, the Australian Government statistics offered in evidence by Zenith itself during the embargo hearing (in attempting to disprove the embargo) affirmatively demonstrated that the Australian pool did not prevent the import of radio and television receivers into Australia. These statistics showed that during 1960 to 1964, substantial numbers of radio and television sets were imported

into Australia.[32]

Thus, the record shows that the governmental embargo kept Zenith out of Australia until April 1960; that a patent license permitting imports was available since 1951; that Zenith has not been sufficiently interested to ask for a license; and that others have been importing into Australia.

The Court of Appeals correctly summarized the record when it concluded that: "We see no necessity of discussing at great length Zenith's failure to prove the *fact* of damage with respect to the Australian market, since there is *no* testimony that could reasonably support a finding of *fact* of damage there" (A. 4256).

## V. THE PATENT MISUSE DEFENSE

Since the "Patent Misuse Defense" in relation to U.S. patents (Z. Br. 37-42) is totally unrelated to the main issues before this Court and has been rendered moot by the decision of the Court of Appeals below, we will not make a separate statement of the facts concerning this defense and the Court of Appeals' modification of the injunction dealing with domestic patents, but will instead review the pertinent facts in our patent misuse argument (pp. 159-68, *infra*).

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32. Zenith Cross-claimant Exhibit 4 (A. 3390, 3399-3406) shows the following Japanese imports of radio and television receivers into Australia:

| | Radios | | Television | |
|---|---|---|---|---|
| Fiscal Year | # Sets | £(A) | # Sets | £(A) |
| 1960-61 ..... | 40,706 | 203,735 | • | • |
| 1961-62 ..... | 77,278 | 328,698 | • | • |
| 1962-63 ..... | 157,191 | 564,695 | 413 | 12,498 |
| 1963-64 ..... | 210,526 | 765,334 | 2,773 | 80,177 |

• Included in "Other Foreign Countries."

## SUMMARY OF ARGUMENT

### 1. THE TREBLE DAMAGE COUNTERCLAIM (Argument, Sections I through VII)

The Court of Appeals reversed the treble damage judgments as to Hazeltine Research solely on the basis of Zenith's failure to prove the essential "fact of damage" or impact on Zenith's business by the patent pools in any country during the relevant four-year period, June 1, 1959 to May 31, 1963. Following the requirements of Rule 52(a) of the Federal Rules of Civil Procedure, the Court of Appeals carefully reviewed the entire record and concluded that the findings of fact proposed by Zenith and mechanically adopted by the trial court, without opinion, were clearly erroneous as to all three countries. While stating that there was "some slight evidence" of the fact of damage as to Canada, upon reviewing all the evidence, the Court of Appeals came to a "firm conviction that the trial court made a mistake in inferring from the entire testimony that the essential element of the *fact* of damage had been established by Zenith." Thus the Court of Appeals applied the very test which this Court has repeatedly held should be applied to trial court findings in cases without a jury.

Zenith's principal contention is that the Court of Appeals erred because, Zenith says, the findings were supported by the testimony of Wright and Kaplan. Aside from the fact that the Wright and Kaplan testimony would not justify the decision of the trial court even if taken at face value, that testimony was repeatedly impeached, discredited and shown to be unworthy of belief. In substantial part it was repudiated by the witnesses themselves (*e.g.*, the testimony that the English distributor had attempted to market 405-line television sets which he had converted in his back room

with kits supplied by Zenith, pp. 37-39, *supra*). Part of the testimony was later found by the trial judge to be not believable and unrealistic (*e.g.*, their recall testimony on market share estimates as to England and Australia claimed by the witnesses to be based on an assumption of "starting from scratch" in the markets on June 1, 1959, pp. 24-25, *supra*); other parts were shown to be internally inconsistent and inherently improbable (*e.g.*, their claim that DX 220, which had exactly the same format as to all three countries, should be interpreted one way as to Canada and another way as to England and Australia, although no such distinction had been indicated at the trial, pp. 22-24, *supra*); still other parts were in direct contradiction of Zenith's own contemporaneous documentary evidence in the record (*e.g.*, the claim that the patent pool was stopping Zenith from marketing television sets in England when the contemporaneous correspondence between Zenith and its distributor showed they were waiting for a change in the British broadcast standards, pp. 40-44, *supra*); and, finally, parts were shown to involve an unconscionable contradiction of previous positions taken by Zenith in this case (*e.g.*, the claim that they had taken into account the fact that governmental embargoes blocked Zenith imports into England and Australia when their counsel had said that there was no truth to any such embargo claim and that he could prove exactly the opposite, pp. 19-22, *supra*).

Zenith pretends that these revelations never occurred for it relies upon the discredited testimony of Wright and Kaplan, brazenly asserting that it stands undenied and unimpeached.

Moreover, the record as to each country *affirmatively shows* that Zenith was not damaged during any relevant period, and that its claim that the pools had an impact on

its business during any relevant period is sheer fiction. Zenith filed no counterclaim with its answer which was filed on April 7, 1960. When it obtained lea to file its counterclaim in May 1963, it made a sworn representation to the court that the acts which were the proximate cause of the damages sought occurred *after* the filing of its answer, *i.e.*, after April 7, 1960. But the record can be searched in vain for any acts of any patent pool after April 7, 1960 which in any way involved Zenith or its distributors or dealers or in any way affected Zenith's export business. Indeed, the record is barren of any evidence of any act of the patent pools in any of the three countries within the four-year period preceding the filing of the counterclaim, or at any time subsequent to the September 1957 general releases, which had any impact on Zenith's exports to any of the three countries.

*England* (Section II, pp. 85-98, *infra*). The trial court found that a governmental embargo "and nothing else" blocked Zenith's imports into England from the beginning of World War II until June 1959. In June 1959, Zenith appointed an English distributor, Ramsay, who has since imported Zenith radios without a pool license and has been neither sued, threatened nor even contacted by the British pool. Zenith has never sought a license from the British pool at any time since the lifting of the governmental embargo. In fact, there were changes in the pool agreement and license forms removing the prohibition against imports as the result of which Zenith could have obtained a license from the pool at any time after the lifting of the government embargo, had it desired one.

As to radio, there was an express finding by the trial court that since the 1957 RCA-Zenith settlement there were no pool patents which could be asserted against radios and

that Zenith has been able to export and has freely exported radios to England.

As to television, Zenith's executives Wright and Kaplan had testified unequivocally at the trial that the English distributor had attempted to sell some television sets which had either been manufactured by Zenith to receive the unique 405-line English television system or converted to the English system by the distributor with conversion kits furnished by Zenith, but that Zenith had been held back from larger sales by reason of concern for the patent pool. A finding proposed by Zenith and entered by the trial judge was based on this testimony. On recall, these witnesses recanted their testimony (after it had been exposed as untrue by the discovery deposition of the English distributor) and admitted Zenith had never sent any 405-line sets to its English distributor, and to their knowledge he had never converted any sets to the 405-line system or attempted to market any such sets. The truth was, as shown by the contemporaneous correspondence between Zenith and its English distributor, that Zenith was delaying marketing of sets because it was awaiting the expected change in the English television standards to the 625-line system, which did not take place during the period involved here. That this was the real reason for the delay was epitomized by the following statement in a late 1962 report from Zenith's English distributor: "Nobody knows yet when the regular [625-line] transmissions will start and *until such time naturally we cannot start marketing*" (pp. 41-43, *supra*).

*Canada* (Section III, pp. 98-124, *infra*). Zenith asserts it could not export radio and television sets to Canada in the absence of a pool license without exposing its products to confiscation and its dealers and distributors to patent infringement suits. This assertion is shown to be untrue by

uncontradicted evidence, which reveals that in the period involved in this case, Zenith has exported and sold tens of thousands of radio and television sets in Canada without a pool license, none of its products has been confiscated, and none of its dealers or distributors has been sued for patent infringement or even threatened with suit by the pool.

The only incidents which occurred after the 1957 settlement of the RCA-Zenith case were the 1958 publication of a pool advertisement in a Canadian trade publication, and conversations between the pool and Zenith in late 1958 and early 1959. While Zenith's president Wright claimed that dealers expressed concern following the 1958 publication, no such dealer testified or was even identified, no documentary evidence was offered and Wright acknowledged he could recall no expressions of concern after 1958. Similarly there is nothing in the record to show that the 1958-1959 discussions had any impact on Zenith's business. Rather, the record shows that following the 1958 publication, Zenith in strong language advised the pool that Zenith considered itself "fully licensed" under all relevant patents controlled by the Canadian pool; and threatened suit against the pool in case of any interference. Since that time Zenith has imported into Canada in growing quantities and has extensively advertised its products throughout Canada, with absolutely no interference or threats of any kind by the Canadian pool.

Moreover, these two 1958-1959 incidents were before the filing of Zenith's answer. By its failure to assert any claim in April 1960 when it filed its answer and by its sworn representation when its counterclaim was filed in May 1963, that the acts which caused its damage occurred *after* the filing of its answer, Zenith not only waived any right to rely upon these incidents as damage-causing acts but admitted that they caused *no injury* to Zenith's business.

The vague claim of Zenith's president Wright that Zenith had somehow and in some undetermined amount held back on its advertising in Canada was contradicted by Zenith's own exhibits showing that it spent 11 to 13% of its sales dollars on advertising in Canada in 1960, and by its vice president Kaplan who said Zenith's Canadian advertising expenses were what would be expected when entering a new market.

In addition, Zenith's contentions concerning alleged effects on its abilities to obtain distributors, its alleged holding back on advertising, and its contention that the continued existence of the Canadian pool somehow affected its business, are directly contradicted by the admissions contained in Zenith's contemporaneous Annual Reports to its shareholders during the relevant period. These reports reveal that Zenith, at the time of its activities in Canada, was telling its shareholders and the public exactly the opposite of what Wright and Kaplan claimed to be the fact in their testimony several years later. For example, Zenith's 1959 report, covering the very first part of the period for which Zenith was granted damages in this case and published *after* the *last* act of the patent pool in any way involving Zenith, not only referred to "substantial" gains and "gratifying performance" by its Canadian market, but also said:

> "Zenith now has a strong distribution network at both the wholesale and retail level throughout Canada, supported by powerful national and local advertising."

*The domestic patent suit and negotiations* (Section IV, pp. 124-33, *infra*). Zenith's contention that the bringing of the instant domestic patent suit by Hazeltine Research and the licensing negotiations on U.S. patents interfered with Zenith's Canadian business is an attempt to revive

claims which Zenith abandoned in the trial court. At the trial, Zenith's counsel specifically stated that the evidence concerning the domestic patent negotiations "didn't have anything to do with" the conspiracy charges. There is no testimony or other evidence connecting these domestic acts with anything done by the Canadian pool or any other pool and no testimony or evidence that these domestic patent activities had any effect on Zenith's business in Canada or any other country. Both the trial court and the Court of Appeals agreed that these domestic activities had nothing to do with the alleged conspiracies.

*Australia* (Section V, pp. 133-40, *infra*). As in the case of England, an embargo instituted by the Australian government at the beginning of World War II was an absolute barrier to Zenith's imports. In Australia the embargo was in effect until April 1, 1960. Subsequent to the lifting of the embargo, Zenith was not even sufficiently interested in the Australian market to inquire of the Australian pool whether a license could be obtained, although one was in fact available if Zenith wanted it.

Zenith's claim as to Australia is based entirely upon a theoretical restraint which it creates by an erroneous contention that the Australian pool would issue only one form of license agreement which prohibited the licensee from importing, whereas in fact the pool issued two forms of licenses, and the manufacturer's form available to Zenith had permitted imports ever since 1951. The record shows that substantial quantities of radio and television sets have been imported into Australia by others, and the only reason Zenith did not import or obtain a license was an apparent lack of sufficient interest in the Australian market, no doubt due to economic barriers such as high tariffs, transportation costs, etc., which would have made it difficult to compete in the Australian market.

*Demand for a license* (Section VI, pp. 140-42, *infra*). Contrary to Zenith's assertion, the Court of Appeals did not hold that a demand for a license was a prerequisite to recovery. Rather, the Court of Appeals merely considered the failure of Zenith to request a license from any of the pools during any relevant period as one of a number of facts indicating the pools had no impact on Zenith's business.

*Offers of proof* (Section VII, pp. 143-44, *infra*). Contrary to Zenith's contention, the Court of Appeals did not rely on offers of proof in concluding that the fact of damage had not been proven as to any country. Rather, it relied on matters clearly in evidence, and largely matters which Zenith itself had put in evidence.

## 2. THE AMOUNT OF DAMAGES
## (Argument, Section VIII)

The question of the amount of damage was not decided by the Court of Appeals and is not before this Court. If that matter were to become an issue, the case should be remanded to the Court of Appeals. The record shows that as to England and Australia the only evidence was discredited by the proof of the embargoes, the witnesses' own recall testimony, and the findings of the trial court that it was neither "realistic" nor "believable;" and as to Canada there is no evidence as to loss of market share, sales or profits resulting from alleged pool activities during the relevant period.

## 3. THE CHARGE OF UNLAWFUL CONSPIRACY
## (Argument, Section IX)

The question of the legality of the foreign patent pools and the participation of Hazeltine Research or its parent

in such pools is not before the Court because it was not passed on by the Court of Appeals. In any event, the record shows that Hazeltine Corporation acted in good faith in dealing with its foreign patents.

## 4. THE INJUNCTION
(Argument, Section X)

The Court of Appeals correctly vacated the injunction as to foreign commerce. It did not, as Zenith contends, hold that proof of actual injury was necessary to warrant an injunction. Its holding was that on the facts of record "injunctive relief against 'threatened loss or damage' directed at those pools, alleged by Zenith to be unlawful conspiracies, cannot be justified under 15 U.S.C. Sec. 26." The facts here show that there was no threatened loss or damage to Zenith's business in any of the countries involved. Zenith's inflammatory assertions about alleged *current* conditions are unsupported and untrue. The English pool has been out of existence since June 30, 1964, a license has been available from the Australian pool since 1951, and Hazeltine Corporation's patents have been out of the Canadian pool since the end of 1965.

## 5. THE DOMESTIC PATENT MISUSE "DEFENSE"
(Argument, Section XI)

The patent in suit has been held invalid, a finding of domestic misuse on other grounds was affirmed, Zenith has been awarded all the damages it requested, and Hazeltine Research has not sought review of these holdings. The misuse "defense" argued at length in Zenith's brief is therefore moot. But even if not moot, there is no merit to Zenith's contentions. Hazeltine Research's license offer as to black and white television patents was reasonable in light of the then existing commercial realities and was not

coercive to force acceptance of a package license. Indeed, a number of licensees accepted a license under a single patent in response to the same offer. Similarly, the royalty basis proposed by Hazeltine Research, *i.e.*, measuring royalties on the total production of the type of products licensed, was proper under *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827 (1950).

## ARGUMENT

### I. INTRODUCTION

Zenith asserts that the record shows a "clear case of intentional injury to petitioner's electronic business in three foreign markets" (Z. Br. 59). This assertion is made despite the fact that in two of the countries (England and Australia) licenses with no import restrictions have been available at all times when governmental embargoes did not constitute an absolute barrier to importation, and despite the fact that in the third country (Canada) Zenith has freely imported tens of thousands of radio and television sets during the entire supposed damage period without interference by the patent pool.

Zenith's argument (Z. Br. 55, *et seq.*) is a thinly disguised appeal to this Court to award it damages on the theory that if respondents have been somehow connected with "patent pools" public policy would be furthered by the payment of these enormous sums to Zenith. It is a brazen attempt by the boasted giant of the television industry, under the guise of public policy, to persuade this Court to award to it millions of dollars of damages which it never suffered, against companies not possessing the assets to pay such judgments, but which do possess valuable television patents.

Zenith is even prepared to go so far as to make an *insin-*

*vation of treason* to try to create prejudice against respondents. Allegedly to show the "public interest involved," Zenith reproduces (Z. Br. 101) a part of the remarks of Senator Russell B. Long at a hearing of a Senate subcommittee, the quotation being so excised and arranged as to make it appear that Senator Long was suggesting that Hazeltine Corporation's patents had been put in "[i]nternational patent pools" which had been *"used in the past to transmit military information—even to our enemies."*

The fact is that in his statement Senator Long referred to the findings and conclusions of the trial court in this case, which somebody had furnished him.[33] He then went on to a *new subject*—the alleged use of international patent pools to transmit military information, and on this subject mentioned two companies, *neither* of which was Hazeltine Corporation.[34] Yet Zenith has included this reference to transmission of information "even to our enemies" in such fashion as to suggest that Senator Long was talking about Hazeltine Corporation!

Hazeltine Corporation's primary business consists of furnishing specialized military electronics equipment to the government of the United States and to allied govern-

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33. This statement was made before the appeal was decided and it seems fair to question whether the Senator was aware that the decision was being challenged on appeal.

Concerning Senator Long's remarks about use of government funds to pay for Hazeltine Corporation's research, there is no indication that the patents involved in this suit were in any way related to or derived from Hazeltine Corporation's military work.

34. So that the Court may fully understand what Zenith has done, we reproduce in Appendix B to this brief the full text of Senator Long's remarks on "Some International Aspects of Government Patent Policy" as printed by the U.S. Government Printing Office.

ments, much of which is of the most highly sensitive nature (A. 4135-36). The deliberate inclusion and distortion of these excerpts from the Senate hearing is indefensible.

### A. The Court of Appeals Was Correct in Holding That Zenith Had the Burden of Showing Damaging Impact or the "Fact of Damage" During the Relevant Period.

The Court of Appeals held that "the crucial question is whether the district court's finding that Zenith was in fact damaged by the pools in the three countries during the four-year damage period preceding the filing of the counterclaim is clearly erroneous" (A. 4254). It pointed out that:

> "Zenith had the burden at the trial of showing an 'injury to [its] business,' 15 U.S.C. Sec. 15, by proving the unlawful conspiracies and the *fact* of damage as a proximate result of the alleged unlawful conspiratorial activities. *Story Parchment* v. *Patterson*, 282 U.S. 555; *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251; *Continental Ore* v. *Union Carbide*, 370 U.S. 690" (A. 4254).

An antitrust treble damage claimant is not entitled to financial recovery for acts allegedly in violation of the Sherman Act unless he proves the fact of *damaging impact* on his business or property, resulting from the alleged antitrust violation (15 U.S.C. § 15). This requirement is nothing more than the tort concept that a claimant must prove he was injured by something the defendant did or was legally responsible for.

Under some circumstances, the courts have allowed some liberality in the proof required to show the *amount* of damage once the damaging impact on the claimant resulting from the alleged antitrust violation has been established. However, the "clear distinction" between the "measure

of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary . . . to fix the amount" has been uniformly recognized since this Court's decision in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). The decisions since then have been recently summarized by the Court of Appeals of the Fourth Circuit as follows:

> "It is uniformly held that liberality may be used in estimating the amount of damages after it has been shown that they were caused by acts contrary to the anti-trust statutes, but that this liberality does *not* extend to proof that the damages were caused by the illegal acts." *Dantzler* v. *Dictograph Prods., Inc.*, 309 F. 2d 326, 330 (4th Cir. 1962), *cert. denied*, 372 U.S. 970 (1963).

While Zenith's statement that "there has been a great deal of confusion" as to the proof required of the "so-called 'fact of damage'" (Z. Br. 59) appears to take issue with this well established rule followed by the Court of Appeals, Zenith apparently concedes that the fact of damage *must* be proved when it says that it can be proved just as any other fact in contested litigation (Z. Br. 60). Here, as the Court of Appeals held, Zenith not only failed to prove damaging impact on its business, but the record affirmatively shows that in the period involved, other factors were the cause of its failure to import into England and Australia, and that in fact Zenith imported substantial quantities into Canada without interference by the pool.

**B. The Court of Appeals Applied the Proper Legal Standard in Reversing the District Court.**

Although Zenith repeatedly asserts that the Court of Appeals made various holdings "as a matter of law" (see, *e.g.*, Z. Br. 64, 66, 70, 75), almost all of its arguments ulti-

mately come down to *questions of fact*. Rule 52(a) of the Federal Rules of Civil Procedure provides that findings of fact in actions tried without a jury may be set aside when "clearly erroneous." And in *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948), this Court determined that:

> "A finding is 'clearly erroneous' when *although there is evidence to support it*, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been commited."[35]

The Court of Appeals' review of the trial record in this case caused it to have such a conviction (A. 4257, 4259).

Zenith repeatedly points to the testimony of Wright and Kaplan as evidence allegedly supporting the findings adopted by the trial court, even referring to testimony which the witnesses themselves later repudiated (*e.g., compare* Z. Br. 87-88 *with* pp. 32-39, *supra*; pp. 88-90, *infra*).

But Rule 52(a) was intended to enable an appellate court to reverse the judgment of a trial court sitting without a jury despite evidence supporting the findings of the trial court. This Court and the Courts of Appeals have repeatedly held that under Rule 52(a) the trial court's findings of fact in actions tried without a jury may be set

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35. This test has been uniformly followed, see, *e.g.*, United States v. Singer Mfg. Co., 374 U.S. 174, 194-95 n.9 (1963); Commissioner v. Duberstein, 363 U.S. 278, 291 (1960); Plastic Contact Lens Co. v. Butterfield, 366 F.2d 338, 346 (9th Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); Tenney v. A.B. & W. Transit Co., 364 F.2d 493, 494-95 (4th Cir. 1966); Oil Screw Noah's Ark v. Bentley & Felton Corp., 322 F.2d 3, 5-6 (5th Cir. 1963); W.R.B. Corp. v. Geer, 313 F.2d 750, 753 (5th Cir. 1963), *cert. denied*, 379 U.S. 841 (1964); Bjornson v. Alaska S.S. Co., 193 F.2d 433, 433-34 (9th Cir. 1951).

aside as "clearly erroneous" if the appellate court after considering "the entire evidence" is left with the firm conviction that a mistake has been committed (see cases cited at n. 35, p. 81, *supra*).

Moreover, contrary to Zenith's contention (Z. Br. 62), the Court of Appeals may take into account the credibility of the testimony. As recently noted by the Court of Appeals for the District of Columbia in *Jackson* v. *United States*, 353 F.2d 862, 866 (D.C. Cir. 1965):

> "While the trial judge's observation of demeanor must be given appropriate weight, it must be remembered that '[c]redibility involves more than demeanor. It apprehends the overall evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence.' Carbo v. United States, 9 Cir., 314 F.2d 718, 749 (1963), cert. denied, 377 U.S. 953, 84 S.Ct. 1625, 12 L.Ed.2d 498 (1964). Thus, to the extent that the credibility of the police officers in this case turns on their demeanor, we must defer. But that the officers seemed to be telling the truth does not end the matter. A number of other factors often considered in judging credibility must be examined, such as whether the witness was interested in the outcome, his reputation, his degree of recall, the internal inconsistencies in his testimony, and the likelihood of his story."

See also *Holbrook* v. *Institutional Ins. Co. of America*, 369 F.2d 236, 241-42 (7th Cir. 1966); and *McDonald* v. *Kropp*, 373 F.2d 549, 558 (6th Cir. 1967), in which the court acknowledged that credibility is generally for the district judge but said that "there can come situations in which the reviewing court *can and must* reverse when *on the entire*

*evidence* it 'is left with the definite and firm conviction that a mistake has been committed.'"

The trial judge himself found that certain parts of the testimony of Wright and Kaplan were not believable (pp. 24-25, *supra;* pp. 119, 145, *infra*), and there are other matters in the record (wholly unrelated to demeanor, *cf. United States* v. *General Motors Corp.,* 384 U.S. 127, 141-42, n.16 (1966)) which cast doubt upon the credibility of their entire testimony. The testimony of these witnesses at the original trial was inconsistent with facts subsequently brought out and with their own testimony on recall (see pp. 18-21, 54, *supra;* pp. 111-12, *infra*). On some important matters, they were forced to recant their earlier testimony (see pp. 37-39, *supra;* pp. 88-90, *infra*). The testimony is also inconsistent with the contemporaneous documents (see pp. 40-43, 55-60, *supra;* pp. 91-92, 113-16, *infra*).

In addition, the findings themselves are contradicted by statements of the trial judge (*cf. Holbrook* v. *Institutional Ins. Co. of America,* 369 F.2d 236, 242 (7th Cir. 1966)), and are also internally inconsistent (*cf. United States* v. *Singer Mfg. Co.,* 374 U.S. 174, 194-95 n.9 (1963)). For example, Finding XXII (A. 2901-02) acknowledges that after 1957 all basic radio patents had expired and that "Zenith *has been able* for the first time to export to and sell its radio receivers in the English market." Yet, another finding (Amended Finding XXXVI, A. 3537) awards Zenith $2.2 million (when trebled) for alleged damages in loss of radio sales in England in the period from 1959 to 1963.

Ignoring the distinction between a jury determination of facts and findings of a trial judge, Zenith argues (Z. Br. 61) that the Court of Appeals was required to view the

evidence in the light most favorable to Zenith and give it the benefit of all inferences. This is a correct statement of the rule applicable in jury cases[36] because:

> "Where a jury has tried the matter upon correct instructions, the only inquiry is whether it cannot be said that reasonable men could reach differing conclusions on the issue." *Commissioner* v. *Duberstein*, 363 U.S. 278, 290-91 (1960).

That the same test does *not* apply in a nonjury case, however, was made clear by this Court in *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 394-95 (1948). Referring to Rule 52(a) this Court said:

> "It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does *not* have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court *may reverse* findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. *The findings were never conclusive, however.*"

Thus, in a nonjury case where the issue is the correctness of findings entered by a trial judge, the Court of Appeals

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36. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), upon which Zenith principally relies, was a jury case in which the Court of Appeals decided that a verdict for the defendants should have been directed (370 U.S. at 696), and of course under such circumstances, the court must view the evidence in the light most favorable to the claimant.

can review *and reject the inferences drawn by the trial judge* even when there is some evidence to support them, if they are clearly erroneous (333 U.S. at 393, 395-96). See also *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194-95 n.9 (1963).

Moreover, there is a highly important factor relating to the findings in this case which Zenith has failed to bring to the Court's attention. The findings here are not the independently drafted findings of the trial court but are instead findings submitted by Zenith and "mechanically adopted" by the trial judge. See *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964). Indeed, the trial judge did not even file an opinion but merely sent the parties a letter stating he was adopting the findings of Zenith (A. 2857-58). Since the findings were prepared by an advocate and not "drawn with the insight of a disinterested mind" (376 U.S. at 656), the Court of Appeals was even more justified in being guided by the over-all impact of the whole record.

## II. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT ZENITH SUFFERED NO INJURY AS TO ENGLAND.

With respect to England, the Court of Appeals said:

> "We also conclude that Zenith failed to prove the *fact* of damage with respect to the English market. A World War II embargo prevented Zenith from importing its products into England until June, 1959. At that date all basic radio patents had expired, and Zenith had no difficulty in doing radio business in England. The difficulty Zenith had in the English market with its TV products cannot reasonably be at-

tributed to the activity of an unlawful conspiracy in that country. Significant barriers other than patent difficulties operated to prevent sales of Zenith TV receivers in England. Zenith sets manufactured in the United States operated on 525-line and 625-line scanning signals. The English standard was a 405-line signal until changed to 625-line after the damage period. Zenith sets sold in England would be in competition with substantially lower priced British sets. There was no testimony that the British pool, during the damage period, had threatened or filed suit on any patents.

"We think it is unreasonable to infer that Zenith intended to and was prepared to enter the English television market during the damage period. The only reasonable inference is that it was waiting for a change in English standards to a 625-line system. Zenith was not aided, in showing loss of probable profits, by the testimony that its man in England could adjust Zenith sets to the English standard 'with a screwdriver in the back of the shop in a few minutes'" (Emphasis by the court; A. 4257).

Zenith's brief as to England, both in the Statement of the Case and in its Argument, constitutes an obvious and callous attempt to brazen out the fact that its entire claim and its testimony were affirmatively discredited. It seeks to do this by almost completely ignoring the record.

### A. The Claim That for Years the Pool Kept Zenith Out of England Was Destroyed by Proof of the Embargo.

We have pointed out how the original finding that for years prior to the 1957 RCA settlement Zenith tried to import into England and was kept out by the pool (Finding XXI, A. 2901) was proven false by the trial court's finding

after the embargo hearing that the "iron curtain" of the English governmental embargo "and nothing else" had kept Zenith out of England from World War II until June 8, 1959 (pp. 16-17; *supra*; A. 3203, 3205). Zenith never appealed from this finding. Thus, Zenith can hardly quarrel with the Court of Appeals' statement that "A World War II embargo prevented Zenith from importing its products into England until June, 1959" (A. 4257).

Nevertheless, Zenith *still* asserts that "[t]he record shows that *throughout the years* Zenith made many efforts to enter the English market," but "[o]n each occasion" was kept out by pool threats (Z.Br. 33). But all it can cite as purported support for the charge is: (a) the statement by Wright that sometime in 1955 he had conversations with an officer of a pool member who indicated that he did not think the pool provisions would be modified (A. 462-63);[37] (b) the testimony of Wright that Zenith had made some attempts to enter the English market "in the thirties" (A. 473-74); and (c) two letters (DX 101A, A. 1517-18; and DX 108, A. 1542-44) which had been written on *December 7, 1934* and *September 13, 1937* (Z. Br. 33-34). This then is the "evidence" by which Zenith seeks to get this Court to overlook the ruling of the trial court and the Court of Appeals concerning the embargo.

### B. The Claim as to Television Was Based on Discredited Testimony.

Zenith could have no claim as to England unless and only to the extent it could show damage-causing acts after

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37. Such a conversation, if it occurred, was academic since the embargo lasted until June 1959.

the lifting of the embargo on June 8, 1959.[38] We outlined in the Statement of the Case (pp. 32-39, *supra*) how Zenith's witnesses at the original trial told a story about attempts to enter the English television market during the 1959-1963 period, and how on later recall they were forced to recant that testimony.

That outline showed that Wright and Kaplan had testified at the original trial that Zenith "*actually made sets* at Zenith that can be used in the *British market*" (Kaplan, A. 531); that Zenith *had sent* "a very few *television* receivers to Mr. Ramsay," the English distributor, "which *he has attempted to market*" (Wright, A. 464); that "we have to make *minor modifications* in these sets" (Wright, A. 464); that "we *supply him* [Mr. Ramsay] with *parts and kits* to do that at times" (Wright, A. 464); and that the changes are so simple that "our distributor *changes them in his back room*" (Kaplan, A. 545). Finding XXII, adopted by the trial court assumed this testimony was correct: "Zenith *has successfully engineered* sets for the British market and *has shipped some* to its English distributor" (A. 2902). On this basis, the trial court initially entered a damage finding of $8,079,859 as to English television (Finding XXXVI, A. 2908), which would have been *over $24 million after* trebling.

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38. Irrespective of the embargo, Zenith's claim in England, as in the other two countries, is subject to other limitations. First, Zenith's counsel Crotty swore in connection with Zenith's motion for leave to file its counterclaim that its damage was caused by acts occurring after its answer was filed on April 7, 1960 (A. 63); second, it is also faced with the limitations contained in its Finding XXXVI asserting damages only for the "4-year statutory damage period" (A. 2908), as well as Section 4B of the Clayton Act (15 U.S.C. § 15b); and finally, all damages suffered after September 27, 1957 from alleged pool interference which occurred on or before September 27, 1957 would be barred by the releases given by Zenith in the RCA-Zenith case (see pp. 47-49, *supra*).

Then, additional discovery revealed the fact that Zenith had *never sent* any sets *designed* for English standards to Ramsay; had *never sent* him any *parts, kits* or instructions for converting sets to the 405-line system; the distributor had *never converted* a single Zenith set to the English system (except one set for his own use after the Zenith witnesses had testified); and he had *never attempted to market* any 405-line sets in England (pp. 36-37, *supra*).

Finally, when Wright and Kaplan were recalled to the stand, and were faced with the fact that the truth had been discovered, they were forced to admit on cross-examination that "I do not believe" that sets converted to receive the English transmission were sent (Wright, A. 3498); that "it is my understanding *now*" that *un*converted sets were sent (Wright, A. 3498-99); that "I didn't know" whether Ramsay had attempted to market any sets (Wright, A. 3500); and that "I don't of my own personal knowledge know" whether Ramsay ever attempted to convert any sets (Wright, A. 3503). Wright even went so far as to try to cover up his original testimony by saying that the parts and kits previously testified to had been "to install a *long wave band on radio receivers*" (A. 3503), but he was then forced to admit that his original testimony about "parts and kits" (A. 464) referred to television sets and made no mention of radio (A. 3503) (see pp. 37-39, *supra*).

And the testimony of Kaplan, previously so unequivocal that Ramsay had converted sets in his back room and that Zenith had made sets for the English 405-line system, was a series of "I don't know," "I don't know," nd "it was my *impression*" (A. 3472, 3473, 3475) (see p. 39, *supra*).

Nothing could be more revealing than the following two answers on cross-examination of Joseph Wright on recall:

> "Q. In other words, *when you testified* back in—you told the Court back in February of 1964 that Zenith

had sent a few television sets to Mr. Ramsay which he had attempted to market, *you did not know whether or not* those sets were equipped to receive English television?

"A. No, sir, *I did not*" (A. 3499).

• • •

"Q. Well, *when you told the Court* that Mr. Ramsay had attempted to market these sets, *did you know whether or not* he did in fact attempt to market them?

• • •

"A. *I didn't know* specifically what he had done" (A. 3500).

*These are the same men, the principal executives of a major corporation, who had given the previous unequivocal testimony which had led the trial court to enter a finding as to English television calling for a treble damage award of over $24 million.*

Yet, despite these disclosures, Zenith's brief to this Court (Z. Br. 86-88) quotes at length from some of this *same discredited testimony,* and asserts: "There was *no denial* of this testimony, and there is *no other evidence* in this record on the issue" (Z. Br. 88)! Zenith seeks to avoid the revelation of the truth by pretending it never occurred.

Another illustration of Zenith's brazenness is shown by the circumstances surrounding its criticism of the Court of Appeals' statement that "Zenith was not aided, in showing loss of probable profits, by the testimony that its man in England could adjust Zenith sets to the English standard 'with a screwdriver in the back of the shop in a few minutes'" (A. 4257). Zenith now says that there is "no such testimony in this record" (Z. Br. 86), but at the trial its own counsel so characterized the testimony, saying:

"MR. McCONNELL: Wait a minute. If you are going to *summarize the testimony, it was* also testified by Mr.

> Kaplan *that all of the changes* that were necessary to be made, the distributor could *make in a back room with a screwdriver*" (A. 758).

In light of the record, the Court of Appeals' comment that "Zenith was not aided" by such testimony was charitable to say the least, and reflects the doubts of the court as to the credibility of Zenith's witnesses.

As pointed out in the Statement of the Case (pp. 40-44, *supra*), the real reason Zenith did not attempt to enter the English television market during the four-year period was that it was awaiting a change in the English broadcast standards from the English 405-line system to the 625-line (CCIR) system, used in some other countries to which Zenith was already exporting. The Court of Appeals after reviewing all the evidence, concluded:

> "We think it is unreasonable to infer that Zenith intended to and was prepared to enter the English television market during the damage period. The only reasonable inference is that it was waiting for a change in English standards to a 625-line system" (A. 4257).

Zenith attacks this conclusion by asserting that the Court of Appeals "retried the damage issue in England . . . *de novo*, not on [the] basis of the original record but apparently relying largely on offers of proof" (Z. Br. 85) and that the Court of Appeals' conclusion was based "substantially on the basis of post-trial offers of proof which petitioners [sic] had no opportunity to meet" (Z. Br. 86). Like so many of Zenith's statements, the assertion that the court's conclusions as to England were "based on offers of proof" is untrue. For the Court of Appeals not only had before it the spectacle of Wright's and Kaplan's forced retreat from their original testimony, but also the revelations from documents from Zenith's *own* files *in evidence* as

part of a Zenith "Bulk Exhibit" at the original trial (DX 112, A. 1559-93; see pp. 40-44, *supra*).

The fact that Zenith was waiting, not because of any supposed pool activity, but for a change in the English transmission standards from 405-line to the 625-line CCIR system, is shown over and over again in that Zenith-Ramsay correspondence. Nothing could more clearly support the Court of Appeals' ruling than the letter of *November 8, 1962*, near the end of the four-year period, from Ramsay to Zenith, stating: "Nobody knows yet when the regular [625-line] transmissions will start *and until such time* naturally *we cannot start marketing* . . ." (A. 1593).

The conclusion of the Court of Appeals thus rests squarely upon contemporaneous documents in evidence from Zenith's own files. Such documentary evidence is controlling over discredited testimony of interested witnesses. *United States* v. *duPont & Co.*, 353 U.S. 586, 602 (1957); *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395-96 (1948).

It is true that Hazeltine Research did make offers of proof of *additional* material which it had collected in anticipation that the trial court would allow additional hearings once the embargo was established (Offer of Proof, A. 3550-3708, 3758-4129). One such document offered was Ramsay's printed price list for Zenith radios and stereophonic equipment (Plt. London Dep. Exh. 47, A. 3987-89) stating that:

> "*We regret that for the time being our* combined *Television*/Radiogram units *cannot be used* in the U.K. *until the system of television transmission is changed to 625 lines* which is now under consideration" (A. 3989).

Facts *in evidence* showed that the price of the average Zenith set imported into England would be almost double the price of the average British-made set (see p. 144, *infra*). The offer of proof contained evidence of *additional* factors bearing on imports. These additional factors, such as transportation, taxes and the added cost of a distributor-importer, not disclosed in the original record, would have made Zenith sets *more* than double the average British price, making a meaningful market penetration impossible (Ewing Aff., A. 3570, 3582-84; Ramsay Dep., A. 3815-16; Plt. London Dep. Exh. 60, A. 4061-62).

However, there is nothing in the opinion of the Court of Appeals indicating that it relied upon any offer of proof. Its conclusions that "it is unreasonable to infer that Zenith intended to and was prepared to enter the English television market during the damage period," and that "[t]he only reasonable inference is that it was waiting for a change in English standards to a 625-line system" (A. 4257) were inescapable in light of the admissions of Zenith's own witnesses on recall and Zenith's own documents *in evidence*.

### C. The Trial Court Findings and Zenith's Own Evidence Affirmatively Establish the Absence of Any Damaging Impact on Zenith's Radio Exports to England.

At the original trial Wright admitted that Zenith's English distributor had been importing radios since 1959 and that "[a]pparently *the pool has not bothered him insofar as radio is concerned*, and I am not surprised at that because, actually, there are hardly any radio patents left that anyone would seriously think of threatening infringement with" (A. 463-64). Accordingly, Finding XXII included the statement that following the settlement in the RCA-Zenith case, Zenith "began to ship radios to the British market" and

that "since all basic radio patents have expired, Zenith *has been able* for the first time to export to and sell its radio receivers in the English market" (A. 2901-02). Nevertheless, adopting Finding XXXVI proposed by Zenith, the trial court initially awarded Zenith damages in the amount of $1,169,067 before trebling for "England—Radio" (A. 2908), and ultimately included in the final treble damage judgment over $2.2 million for alleged lost radio sales to England (A. 3537).

In view of the admitted fact that there was no interference after 1957, and in view of the indisputable fact that the embargo imposed by the British government was the sole reason Zenith was kept out of England from 1939 to June 8, 1959, there is no basis for any damage award to Zenith concerning radio, either in the original amount or in the reduced amount ultimately granted by the trial court.

Zenith's brief, assuming that the pool was responsible for Zenith's failure to import television sets (which we have shown it was not), asserts that Zenith could not develop the English radio market unless its radio imports were accompanied by imports of television (Z. Br. 34-35). There is no suggestion of this in the trial court findings or the evidence. The record references referred to by Zenith contain not one word in support of this theory; in fact, they support the contrary. References A. 463-64, 474, are to Wright's testimony in which he *admitted* there had been no *interference* as concerns radio. The only other reference is to Zenith's Bulk Exhibit 113 (A. 1594-1606), a random series of letters during 1958 and 1959 from individuals and a would-be distributor inquiring about Zenith's products, but the significant thing is that practically all of these inquire about Zenith *radios* only, and not one suggests any difficulty in marketing radios without television sets!

Again we have an illustration of how Zenith, having misled the trial court into an award of damages without basis in the record, seeks to substitute ingenuity for a record basis. The Court of Appeals' conclusion that, "At that date [June 1959] all basic radio patents had expired, and Zenith had no difficulty in doing radio business in England," (A. 4257) is the only conclusion which could be reached on this record.

**D. The English Pool Agreement and License Forms Were Changed to Remove the Prohibition Against Imports.**

We have outlined in the Statement the changes in the English "pool agreement" and the license form (see pp. 44-46, *supra*). As pointed out, the record shows that as of July 1, 1960, the provision in the pool agreement prohibiting the licensing of imports by individual pool members was eliminated and the right of individual pool members to license "for imports" was expressly recognized. The last pool license forms in evidence containing an agreement by the licensee not to import expired by their terms on December 31, 1957 (DX 67, A. 1344, 1346, 1348; DX 68, A. 1356, 1358, 1360) and the only license forms in evidence after that date (forms A8-T and A8-S, July 1, 1960-June 30, 1964, DX 70-71, A. 1380-1401) contain no such provision. Moreover, Hazeltine Research's offer of proof showed that the provision prohibiting imports by the licensee had actually been *deleted effective January 1, 1958* by letter sent by the manager of the pool to licensees on about November 20, 1957, offering an extension of licenses to June 30, 1960 (A. 3701-06).

Zenith's answer to this (Z. Br. 30-34) constitutes a masterpiece of dissembling, *designed to obscure the fact that these changes were made.* First, as concerns the pool agreement itself, Zenith quotes (Z. Br. 31) paragraph 7 of the

agreement effective January 1, 1953 (DX 58, A. 1248, 1258), which did involve an agreement not to license imports except to a limited extent. Then Zenith says, "The last Pool agreement in evidence . . . by its terms ran until June 30, 1964 . . ." (Z. Br. 31). So it did, but Zenith deliberately *omits telling this Court* that the restrictive *paragraph 7* was expressly *deleted* from *that* pool agreement. The extension of the pool agreement to June 30, 1964, specifically provided that "Clauses . . .7 . . . shall be *deleted*" (DX 60, A. 1273). Finally, Zenith quotes from clause 11(g) of the pool agreement indicating that no change should be made in licenses A8-S and A8-T without unanimous consent of the parties (Z. Br. 31), but it ignores the fact that those licenses had already been changed to eliminate the provision requiring the licensee not to import (see pp. 45-46, *supra*).

This tactic continues in connection with the changes in the license form itself. After first asserting that "[t]he A8 license agreements [July 1, 1960-June 30, 1964] . . . *like all the preceding pool licenses*" were restricted to local manufacture (Z. Br. 31), Zenith quotes a paragraph from the *previous* form (*paragraph* 4(a)), which prohibited the licensee from selling sets manufactured outside the country (DX 69, A. 1368, 1372). But the quoted paragraph 4(a) had been *completely omitted* from the A8-S and A8-T forms (DX 70, A. 1380, 1383-84; DX 71, A. 1391, 1395). Thus, the A8 forms were *not* "like all the preceding pool licenses."

In making the statement that the A8 license form was limited to local manufacture and the sale of sets so manufactured, Zenith apparently relies upon language in the granting clause in the A8 license which was similar to that contained in the granting clause of the previous licenses. However, reliance upon this language or any other pro-

vision in the license form to support an argument that the pool continued to prohibit imports must unreasonably assume that the pool went to the trouble not only of striking the quoted paragraph 4(a) of the license form which had expressly prohibited imports by the licensees, but also of deleting the quoted paragraph 7 of the basic pool agreement, without intending that the changes have any effect. Such an unreasonable assumption is not only contrary to settled principles of contract construction,[39] but it could have been proved or disproved by a simple inquiry to the pool had Zenith been sufficiently interested in a license to request one.

Clearly, if Zenith *had been* suffering the millions of dollars of damage in England which it now claims, it would have inquired of the pool after the embargo was lifted as to whether a license to import was then available. The absence of any injury is shown by the fact that Zenith made no such inquiry, yet it now claims damages for a theoretical restraint based on a deliberately erroneous construction of the pool agreement and license form.

Finally, Zenith refers to and quotes from a number of memoranda and letters concerning the pool (Z. Br. 32-34), omitting to point out the age of any of them. For example, the quoted letter from Commander Mayer (Z. Br. 32) is *dated November 17, 1949* (A. 1484); and the Schoenberg letter (Z. Br. 33) *is dated December 13, 1926* (A. 1499). Zenith has not, and cannot, cite any correspondence or memoranda for the period *after* the lifting of the governmental embargo in 1959 indicating that the pool required its licensees not to import or that the pool had any effect on imports.

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39. See Roos v. Texas Co., 23 F.2d 171, 173 (2d Cir. 1927); Phillips Petroleum Co. v. McCormick, 211 F.2d 361, 365 (10th Cir. 1954).

Zenith thus seeks to misuse this ancient history to try to obscure the fact that the British pool *changed its practices* by removing the prohibition against imports. The truth is that Zenith had no interest in a license during the period involved here. Indeed, the British pool itself expired by the terms of the pool agreement on June 30, 1964 (DX 60, A. 1272) and went completely out of existence on that date (Offer of Proof A. 3701-03, 3707-08); yet, Zenith was so little interested that when Wright testified on recall in November 1965, he did not even know that the pool had been out of existence for over a year (A. 3497-98).

## III. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT CONSIDERING ALL THE EVIDENCE ZENITH HAD FAILED TO PROVE THE ESSENTIAL FACT OF DAMAGE AS TO CANADA.

The Court of Appeals said that the testimony of Zenith's president Wright could be considered as "some slight evidence of the fact of damage" (A. 4258). However, based on its review of the entire record, the court concluded:

> "We hold that even though there is some testimony of damage suffered by Zenith in the damage period as a result of pool activities in Canada, we have a *firm conviction* that the district court made a mistake in inferring from the entire testimony that the essential element of *fact* of damage had been established by Zenith" (A. 4259).

Zenith asserts that the Court of Appeals erred and claims that it was injured by (1) the refusal of the Canadian pool to grant Zenith a license to import its American-made radio and television sets into Canada, and (2) infringement suits, threats of infringement suits, and warning notices by the pool against those who imported Zenith sets into Canada without a license.

While Zenith has written its brief in a manner which obscures the date relationship between events, certain critical dates are particularly important in evaluating the record as to Canada:

(1) The September 1957 release. As pointed out above, Zenith gave general releases in September 1957 which released all damages which might result in the future from acts which occurred prior to the date of the releases (see pp. 47-49, *supra*).

(2) May 22, 1959, the cutoff date for the statutory four-year damage period asserted by Zenith in Finding XXXVI (A. 2908).

(3) April 7, 1960, the date of Zenith's answer. In its motion and supporting affidavit of Crotty, its vice president and counsel of record, Zenith represented that the acts which were the proximate cause of damages claimed in the counterclaim occurred *subsequent to* the filing of the answer (see pp. 7, 53-54, *supra*).

With Zenith's contentions and these dates in mind, we turn to the record.

## A. There Was No Refusal to License During the Relevant Period.

As pointed out in the Statement, the evidence as to refusals to license is largely ancient history, dealing with events in the early 1950's and before (pp. 10, 49-50, *supra*). These events are not only long prior to the claimed four-year damage period, but also prior to the general releases given by Zenith in September 1957, and prior to the cutoff date (April 7, 1960) established by the Crotty affidavit. Any recovery based on alleged injury caused by those acts was not only waived by Zenith in its motion for leave to file the counterclaim, but fully compensated for and released as a result of the RCA settlement in 1957.

Zenith says the record is "replete" with efforts by Zenith to obtain a license from the pool (Z. Br. 11). However, as the Court of Appeals noted (A. 4258), the record contains no request by Zenith for a pool license after 1953. Having no explanation for that fact, Zenith argues (Z. Br. 74) that its request for an injunction in the instant suit was in effect a demand for a license. But Zenith's request for an injunction against Hazeltine Research was not a demand for a license from the Canadian patent pool. The injunction which Zenith itself proposed and obtained in the trial court did not in any way require or request that the Canadian patent pool grant Zenith a license. It ran only against Hazeltine Corporation and Hazeltine Research, Inc., requiring them not to enter into any agreement which prevents Zenith from exporting (A. 3079-80). Moreover, if the request for an injunction constituted a demand for a license and if Zenith really wanted a license, why did it not request any such injunction when it filed its answer in this case in 1960?

The reason Zenith never requested a license after the 1957 settlement is clear. As a part of that settlement Zenith received a world-wide license from RCA, General Electric, and Western Electric under all their patents including their patents in the Canadian pool (Finding XXII, A. 2901-02). As a result of these and other direct licenses, Zenith considered its products "fully licensed to the extent that they employ *any* patents administered by Canadian Radio Patents Limited" (DX 138, A. 1879; see also A. 1882, and p. 49, *supra*). Entering the market in late 1958 *without a pool license* Zenith was, in fact, able to sell tens of thousands of radio and television sets in Canada (DX 220, A. 2661). After the RCA settlement Zenith neither wanted a license nor thought one was necessary.[40]

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40. In its brief to this Court (p. 66) Zenith accuses the Court of Appeals of distorting and misstating the record concerning

There were discussions between representatives of the pool and Zenith's Canadian subsidiary in the second half of 1958 culminating in a conversation in Chicago on May 12, 1959, between Brian McConnell, the president of the Canadian pool, and Crotty and Curtis, two of Zenith's lawyers (A. 392, 410; see pp. 52-53, *supra*). But entirely aside from the fact they occurred before the four-year statutory damage period claimed by Zenith,[41] the subsequent actions of Zenith were an admission that no damage resulted. For when Zenith filed its answer in April 1960, some nine months later, it filed no counterclaim, despite the fact that, according to Zenith itself, such counterclaim would have been *compulsory* if Zenith had been injured (A. 62). In addition, the statement in the Crotty affidavit (A. 63) that the acts which caused its damage occurred *after* April 7, 1960, was a judicial admis-

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Wright's statement that Zenith considered itself fully licensed to the extent it employed any patents administered by the pool, pointing out that the licenses did not include color television. However, Zenith *limited* its damage claim to black and white television, and *expressly excluded* color television as to all three countries (A. 502). The *issue* is whether Zenith lost any sales of black and white television sets. Accordingly, Wright's statement that Zenith considered its sets fully licensed and Zenith's sales of large quantities of black and white television sets in Canada without a pool license are highly relevant to the issue of the fact of damage and were properly construed and applied by the Court of Appeals.

41. At the May 12, 1959 meeting, Crotty asked McConnell to send him a copy of the Canadian pool's license form, and McConnell did so on June 5, 1959 (DX 154, A. 2021). Zenith seeks to rely on this letter of June 5, 1959 because it was after the beginning date for the four-year statutory period. However, this follow-up mailing itself adds nothing to the events of May 12, 1959, for if there were a request for a license and a refusal of the pool to grant a license, they occurred on May 12, 1959. Zenith's right to sue, if any, accrued then and was not dependent upon later receipt of the blank license form. See Emich Motors Corp. v. General Motors Corp., 229 F.2d 714, 719-21 (7th Cir. 1956).

sion that Zenith was *not* damaged by these 1959 events upon which it now places such great reliance in its brief to this Court, and a waiver of any right to rely on such events (see pp. 53-54, *supra*).

Further, Zenith failed to offer any evidence that the McConnell meeting caused it any injury. Crotty did not testify that he requested that the pool grant Zenith a license to import, nor did he testify that he considered a license from the pool necessary to enable Zenith to sell in Canada (A. 392, 410-15). So far as the record shows, Zenith was adhering to the position previously taken by Wright that it needed no license (pp. 51-52, *supra*). There was no evidence that the conversation caused Zenith to lose any distributor or dealer or that it was even made known to any Zenith distributor or dealer. Nothing came of the conversation, there were no further contacts between the pool and Zenith or any of its Canadian distributors, and Zenith continued to export to and sell its sets in Canada in increasing quantities (see DX 220, A. 2661; see also pp. 50-51, *supra*).

**B. There Were No Suits or Threats of Suit Against Zenith Distributors or Dealers During the Relevant Period.**

Crotty testified that Zenith's difficulty in the Canadian market resulted from "the threat brought by the pool against [Zenith's] dealers and distributors to stop them selling Zenith radio sets which [were] imported" (A. 565). As proof, Zenith put in evidence correspondence relating to a threat of patent litigation by the pool against a Winnipeg distributor in 1951 which apparently caused that dealer to cease handling Zenith products (DX 155-58, A. 2022-28). A similar threat was made in 1954 against Zenith distributor MacCuspie with similar results (A. 452; DX 161-62, A. 2033-46). But there is *no evidence* of any similar threat

to any Zenith distributor or dealer after the settlement of the RCA case in 1957, much less subsequent to Zenith's answer in this case.[42]

Indeed, subsequent to the releases given in the RCA case, the record establishes only one act by the patent pool which could possibly be regarded as a threat to Zenith dealers, and that was the August 1958 advertisement published by the pool in a Canadian trade publication (see p. 51, *supra*). But Wright took sharp exception to the advertisement, informing the pool by telegram and letter that Zenith, as a result of the settlement of the RCA case, was "*fully licensed*" to the extent that it employed any patents administered by the pool and threatening suit if such publications were repeated (DX 138, A. 1879, 1882). There is *no* evidence that the advertisment was *ever published again* (see pp. 51-52, *supra*).

The finding that such advertisements "continued to be run" (Finding XXX; A. 2905) was clearly erroneous and Zenith's statements in its brief (Z. Br. 14, 64) that such notices were "continuing" to appear are grossly misleading. The exhibit it cites for the statement that such advertisements continued to be run (DX 144, A. 1973-74) is dated *January 13, 1954*. The other advertisements to which Zenith refers at length are all *earlier* than the August 1958 advertisement. One is dated in 1929 (DX 131, A. 1865), another in 1930 (DX 132, A. 1866), another is undated but from its text is obviously from a period before Canada even had television (DX 130, A. 1861-64), and several are dated in the early 1950's (DX 134-35, A. 1868-71), but *none* is dated

42. Even if the contacts between the pool and Zenith itself or its Canadian subsidiary in 1958 and early 1959, were construed to be a threat of infringement suit as Zenith asserts (Z. Br. 63), nothing resulted and they caused no damage as Zenith has admitted (pp. 101-02, *supra*).

after August 8, 1958. Moreover, that no such advertisement appeared after 1958 is shown by the fact that Zenith never brought legal action against the pool as it had threatened to do if the advertisement appeared again (see p. 103, *supra*).

Wright asserted that shortly after the advertisement a number of distributors came to Zenith and expressed concern (A. 472). But Wright not only failed to identify a single distributor or dealer who had stopped handling Zenith's products or whose sales had been reduced because of the advertisement, but Zenith produced no distributor or dealer witness, or any correspondence with dealers or other evidence to show that Zenith's operations or sales were in any way affected by the advertisement (see p. 52, *supra*). The Court of Appeals noted (A. 4258) the failure of Zenith to call any distributor witnesses, who would have been able to testify about any interference had it occurred. Under this Court's decision in *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1939), the inference must be that their testimony would be adverse to Zenith.

Zenith not only failed to follow up its threat in 1958 by bringing legal action against the pool, but it also did not assert a counterclaim against Hazeltine Research when it filed its answer in this case in 1960, a year and one-half after the last such advertisement. Indeed, as in the case of the 1958-1959 negotiations between Zenith and the pool, Zenith's pleadings in this case constitute a clear admission that the advertisement caused it no damage (pp. 101-02, *supra*).

Zenith argues (Z. Br. 64) that the Court of Appeals misapprehended the effect of the pool advertisements and held "as a matter of law" that such a notice could not possibly injure Zenith's Canadian business. On the contrary, the

Court of Appeals did not hold that such advertisements could not possibly injure Zenith's business, but rather held that "[t]here was *no showing that* the 1958 advertisement *had* any adverse effect on Zenith's sales" (A. 4258).

On page 65 of its brief, Zenith says that the Court of Appeals' holding with respect to the 1958 advertisement ignores testimony of Wright that a distributor has to make an investment in inventory and hire salesmen to develop a territory and that "it was *impossible* to get *anyone* who was willing to take that sort of risk." Reading this testimony in context, it is apparent that Wright's reference to such impossibility related to the period *prior to* the 1957 RCA settlement (see A. 452-53). If, as Zenith now contends (Z. Br. 65), Wright's statement was intended to apply to the period *after* 1958, either Wright did not tell the truth on the witness stand, or Zenith did not tell the truth to its shareholders and the public in its annual reports issued in the period from 1958 through 1962. Those reports stated that "[f]our outstanding and experienced independent distributors were appointed to handle the distribution of Zenith products in western Canada" (A. 2991); that Zenith had a "strong distribution network at both the wholesale and retail level throughout Canada" (A. 2993); that its products had "wide acceptance" by the Canadian trade (A. 2993); and that its successes in Canada were the result of the "enthusiasm of distributors and dealers" (A. 2995).[43]

Zenith places considerable reliance upon a report of a Canadian Royal Commission on Patents and on the testimony of Mr. Henderson, a Canadian patent lawyer, con-

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43. These contemporaneous documentary admissions, contained in the Zenith Annual Reports which were part of an offer of proof made by Hazeltine Research before entry of judgment, are discussed in more detail at pp. 112-18, *infra*.

cerning that report (Z. Br. 68-70).[44] The principal point in that report relied upon by Zenith is the statement that the Canadian pool (CRPL) portfolio consisted of 5,000 patents, that the pool had a policy of enforcing its patents against infringers, and that, in the absence of a license from CRPL, "it is doubtful if anyone could sell in Canada a radio or television receiver" (PX 50A, A. 2830). Even if the doubt expressed in the report were justified as to one who had no license under *any* of the pool's patents, it has no probative value as to Zenith.

Zenith already had a license under the patents of RCA, which at one time (1944) held over 79 per cent of the pool's important patents (DX 166, A. 2076), and under the patents of General Electric and Canadian General Electric, the pool's largest shareholder (A. 454-55). It also had a license from Western Electric and licenses under other patents, such as the Parker intercarrier sound patent (A. 480; DX 138, A. 1882). Thus, Zenith asserted that its products were "fully licensed to the extent that they employ *any* patents administered by Canadian Radio Patents Limited" (DX 138, A. 1879; see also A. 1882).

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44. Zenith says (Z. Br. 70) that, in the face of testimony concerning this report, it was error for the Court of Appeals to distinguish Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 (1962), on the ground that in *Continental Ore* "there was clear evidence of defendant's refusal to deal with the Continental Company, as a result of which it had to drop out of the vanadium business" (A. 4260). However, the Court of Appeals was correct in distinguishing *Continental Ore* on this ground because the record here conclusively shows that Zenith did *not* have to drop out of the radio and television business in Canada but that its business in Canada was flourishing and continued to grow until the Canadian government raised its tariff (DX 220, A. 2661; PX 62, A. 2850).

Apparently the pool ultimately agreed with Zenith, for in the four-year period for which Zenith seeks damages in this case, the pool took no action in spite of the fact that Zenith extensively advertised its products and sold over 56,000 television sets and over 65,000 radios in Canada (DX 220, A. 2661). Indeed, at one time during this period, before the tariff was increased (see PX 62, A. 2850), Zenith obtained as much as 5 per cent of the Canadian television market (DX 218, A. 2632). Thus, the record shows that Zenith did effectively compete in Canada without a pool license, and the pool did absolutely nothing to interfere. The logical inference to be drawn from this is that the Canadian pool has acceded to Zenith's position that Zenith products were "fully licensed."

Zenith says that the Court of Appeals held that any exclusion short of total exclusion does not constitute injury (Z. Br. 67). The Court of Appeals made no such holding. Rather, it noted that Zenith had made these substantial sales and had engaged in extensive advertising without any interference by the patent pool (A. 4258-59). If, as Zenith repeatedly contends in its brief, the patent pool had a policy of threatening, suing, and harassing dealers and distributors who imported Zenith's American-made goods, such open and extensive sales and sales activity as was carried on by Zenith[45] and its distributors in Canada during the 1959-63 period would certainly have produced such suits or harassment. Yet the record is barren of any such evidence.

These facts also dispose of Zenith's argument that the

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45. Zenith's own exhibit (DX 218, A. 2647), shows that in Canada in 1960, for example, Zenith itself utilized all forms of advertising media from magazines and newspapers (both trade and general) to billboards and national exhibits.

mere continued existence of the Canadian pool was a damage-causing overt act (Z. Br. 74-75). The existence of the pool neither stopped Zenith from entering the market nor prevented it from steadily building up its share of the market in Canada. There is no showing that the existence of the Canadian pool caused any dealer or distributor in Canada to cut down on his purchases or to refuse to handle Zenith's products. Moreover, the continued existence of the pool, even if it is assumed arguendo to be an illegal conspiracy, does not create a private cause of action. Zenith or any other private treble-damage claimant must prove, in addition to the existence of a conspiracy, that the conspiracy did something which had an impact on its business (see pp. 79-80, *supra*.)[46] In any event, the existence of the pool itself did not injure Zenith because it was in existence in April 1960 when Zenith filed its answer without counterclaim, and Zenith has admitted that it had no cause of action on that date (see pp. 6-7, 101-02, *supra*).

Zenith places reliance upon an incident involving a *Motorola* distributor in May 1962, contending that the Court of Appeals drew the wrong inference from it (Z. Br. 62-63). However, an analysis of the record shows that the only logical inference was that Zenith dealers and distributors were *not* being bothered by the pool. A letter dated May 17, 1962 was sent by the Canadian pool to a Motorola dealer (DX 162D, A. 2054-56); but there is no evidence that such a letter was sent to any Zenith dealer or distributor. Yet, at the very same time this letter was sent to the Motorola distributor, Zenith had a distributor, Mac-

46. See also Baldwin v. Loew's Inc., 312 F.2d 387, 391 (7th Cir. 1963); Suckow Borax Mines Consol. v. Borax Consol., 185 F.2d 196, 208 (9th Cir. 1950), cert. denied, 340 U.S. 943 (1951); Rutkin v. Reinfeld, 229 F.2d 248, 252 (2d Cir. 1956), cert. denied, 352 U.S. 844 (1956).

Cuspie, in the same Canadian town (A. 2053, 2054). The pool's sending of this letter only to the Motorola dealer in that town indicates that the pool was no longer contacting Zenith dealers or distributors.

Indeed, MacCuspie clearly thought so because, when he forwarded the letter received by the Motorola dealer to Wright in Chicago, he said:

> "[I]t is quite evident that our friends Canadian Radio Patents Ltd., are trying to use the same tactics *as they did on us a number of years back*" (DX 162D, A. 2053).

As noted at page 102, *supra*, the pool *had* threatened MacCuspie in 1954 (A. 452; DX 161-62, A. 2033-46), but he was back in business as a Zenith distributor after the RCA settlement. The language of the letter which he wrote to Zenith is that of one member of the Zenith family to another and it does not express any concern about the pool. Although Zenith now attempts to create the impression that MacCuspie was not a Zenith distributor at the time of the Motorola letter, characterizing him as a "former Zenith distributor" (Z. Br. 17, n.4), the fact is that when this letter (DX 162D, A. 2053) was written he was in business as a Zenith distributor as shown not only by the language employed in the letter itself, but by his letterhead which identifies him as a "distributor" and bears the Zenith trademarket saying "Zenith Radio Television Stereo-HiFi."[47]

In any event, Wright could recall no complaint about interference by the pool by *any* Zenith dealer or prospective dealer in Canada after 1958 (A. 471-72, 477-78).

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47. The letterhead was not reproduced in the printed appendix. We have, therefore, reproduced it as Appendix D (A-34) to this brief.

Thus, the finding that the pool "immediately attacked by infringement suit or threat thereof any dealer found to be selling imported receivers" (Finding XXVII, A. 2904) either does not apply to Zenith dealers or must have reference to events prior to the RCA settlement; and the finding that "in every instance where a Canadian distributor began to sell Zenith products he was warned by the Pool to stop and return the merchandise or face expensive infringement litigation" (Finding XXIX, A. 2905) is not supported by any evidence of any such occurrences at any time since at least 1958.

The record thus reduces to certain undisputed facts: *First*, in the four-year period involved here Zenith has sold tens of thousands of radios and television sets in Canada (see DX 220, A. 2661), so that Zenith's assertions that its sets would be confiscated and that *no* dealers or distributors would handle them are untrue. *Second*, no Zenith dealer or distributor had complained of interference by the patent pool since 1958 (Wright, A. 471-72). *Third*, at no time after the last discussion between the pool and Zenith in May 1959, nor at any time during the four years preceding the filing of Zenith's counterclaim has the patent pool either sued or threatened suit against any Zenith distributor or dealer in Canada (see pp. 50-51, 102-03, *supra*).

Not being able to show any suits, threats, or refusals to license in the period involved here, Zenith claimed, through Wright, that the earlier activities of the pool had created "clouds" and "uncertainties" (A. 457, 490) and had a "residual effect" (A. 458). Wright could come up with only two very general allegations as to what this "residual effect" was: (1) it influenced "our own thinking about what we were willing to undertake in the form of promotions and

advertising" (A. 490),[48] and (2) it created a "feeling of uncertainty" on the part of Zenith's distributors and dealers (A. 490) and made it difficult for Zenith to get good distributors (A. 458).

*Advertising.* Zenith offered no evidence as to *how much* it had allegedly reduced its advertising expenditures or what it would have spent on advertising and promotions absent the pool; nor did it offer evidence of the extent to which its sales were supposedly affected by the alleged reduction in advertising. Zenith asserts that Wright's testimony is undenied (Z. Br. 24), but Kaplan's testimony on recall reveals that Zenith did *not* hold back on advertising. Explaining why Zenith used its Canadian figures in making its calculations as to Australia and England, Kaplan said:

> "We also used our actual cost experience in our Canadian operation to the best extent that we knew, and included in this was a portrait of a company getting started into business. *And as a result of getting started into business in Canada, we spent ten per cent in advertising in the first nineteen months period*—ten to eleven per cent. I forget the figure now. And that was gradually—
>
> "THE COURT: Ten to eleven per cent of what?
>
> "THE WITNESS: Of our billings, your Honor.
>
> * * *
>
> "Q. During what period was that?
>
> "A. This is the first nineteen months.

48. In its brief (Z. Br. 22, 74), Zenith asserts that Wright said this alleged curtailment was due to the filing of the instant suit for infringement of Hazeltine Research's United States patent. However, as pointed out in detail in section IV, *infra*, pp. 124-33, neither Wright nor any other witness testified that the domestic patent suit had *any* effect on Zenith's Canadian operation, much less that it caused Zenith to curtail its advertising there.

"Q. You mean—what nineteen months are you referring to?

"A. I'm referring to the nineteen months starting June 1, 1959 to December 31, 1960.

* * *

"Q. I thought you started in Canada before June 1, 1959.

"A. But that is the basis—we did start prior to that, *so we probably had higher advertising expenses prior to that*" (A. 3459).

As noted by the Court of Appeals (A. 4259), the record shows that Zenith spent 11.47% of its Canadian TV sales and 12.94% of its Canadian radio sales on advertising in 1960 (DX 218, A. 2642).

*Distributors and Dealers.* Zenith was unable to offer any correspondence or other documentary evidence of any dealer or distributor either refusing to handle its products or expressing concern for the patent pool within the 1959-1963 period, although such evidence for the period *prior to* the RCA-Zenith settlement was offered by Zenith (see p. 50, *supra*). In fact, Zenith neither called as a witness nor even identified a single distributor or dealer who had refused to handle or stopped handling Zenith's products, or whose sales were affected because of concern for the patent pool at any time after the RCA-Zenith settlement. As noted above, the failure to call such witnesses gives rise to an inference that their testimony would have been adverse to Zenith (see p. 104, *supra*). Moreover, Wright could recall no expression of any concern by any dealer or distributor since 1958 (p. 52, *supra*).

**C. Zenith's Testimony Is Directly Contradicted by Zenith's Annual Reports.**

Although not mentioned in its opinion and apparently not relied upon by the Court of Appeals, the statements

made by Zenith in its annual reports to shareholders and the public, *contemporaneous with its activities* in Canada after the RCA case settlement, directly contradict the later testimony of Wright and Kaplan. The trial court refused to consider these annual reports.[49] We believe that this Court may and should consider these reports (see pp. 116-18, *infra*), which completely "destroy" that testimony.

A comparison of Wright's testimony in February, 1964, with Zenith's annual reports for the years 1957 through 1961[50] shows that the testimony about (1) difficulties in getting adequate dealers and distributors, (2) holding back on promotion and advertising, and (3) being prevented from making an effective entry into the market, was an afterthought created for the purpose of this case.

(1) Wright said Zenith had difficulty getting dealers and distributors (A. 458, 490). *What did Zenith's contemporaneous annual reports say?*

1957 Report "[Y]our Company is inaugurating an aggressive program to set up distribution of radio and television receivers in Canada. . . . Experienced and capable personnel have been employed . . . in Toronto and Montreal. . . . It is anticipated that independent distributors will be appointed to handle the distribution of Zenith products in other areas of Canada" (A. 2990-91).

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49. The 1962 Zenith Annual Report was received in evidence at the trial (PX 62, A. 725-26, 2847); the others, 1957-1961 are part of an Offer of Proof made in the trial court before entry of judgment, and are reproduced in Appendix A to this brief.

50. In each case the reports were issued in March of the year following the year the report covered. For example, the 1957 report is dated March 7, 1958 (Appendix A, A-5).

1958 Report "Four *outstanding* and *experienced* independent distributors were appointed . . . in western Canada" (A. 2991).

1959 Report "Zenith now has a *strong distribution network* at both the *wholesale* and *retail* level *throughout Canada*" (A. 2993).

1961 Report "[T]he *enthusiasm of distributors and dealers* . . . created a growing demand for Zenith products" (A. 2995).

(2) Wright said Canadian promotion and advertising were held back (A. 490). *What did Zenith's contemporaneous annual reports say?*

1959 Report Zenith's Canadian distribution network is "supported by *powerful national* and *local* advertising" (A. 2993).[51]

1961 Report "*Consistent national advertising* . . . created a growing demand for Zenith products in the Canadian Market" (A. 2995).

(3) Zenith claimed it was prevented from making an effective entry into the market, and thus lost sales and profits. *What did Zenith's contemporaneous annual reports say?*

1957 Report "[Y]our Company is inaugurating an aggressive program to set up distribution of radio and television receivers in Canada . . ." (A. 2990).

1958 Report ". . . *significant volume* of purchases of television and radio receivers and phonograph

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51. Zenith's Exhibit 218 (A. 2647) shows that in 1960 it used a great variety of advertising media in Canada, including "Magazine advertising," "Trade paper advertising," "Newspaper advertising," "National Exhibits," "Billboard," "Broadcasting-radio stations," etc.

units by Canadian distributors during 1958" (A. 2991).

1959 Report ". . . *marked progress* in the sales of all products. . . . The Radio and Television Division, established in 1958, *doubled its sales* over the first year and in the closing months achieved a *substantial gain* in its *percentage* of industry sales despite a decline in over-all Canadian industry sales of television receivers. . . . wide acceptance of Zenith products by the Canadian trade and public. . . . Canadian management is confident that Zenith sales and profits together with its percentage of industry sales will continue to rise throughout 1960" (A. 2993).

1960 Report ". . . successfully *countered* the downward *industry sales trend* (which began in Canada in 1955) and *made important gains* in the sale of Zenith television and radio receivers. . . . Canadian management is *confident* that 1961 will see *further increases* in sales and profits and a *rise in its share* of industry sales, despite the possibility that total Canadian industry sales may continue to decline" (A. 2994).

1961 Report ". . . *gratifying progress* during the year, *selling more television* receivers than in the two previous years combined. . . . growing demand for Zenith products in the Canadian market" (A. 2994-95).

Finally, these annual reports make no reference to any continuing "clouds," "threats," or "uncertainties." The 1957 Report, dated March 7, 1958, in announcing plans for Canada stated that Zenith *"had previously been excluded* from participation in the market through the operation of a *cartel"* (A. 2990) but subsequent reports never again mention the Canadian pool.

It is not that Zenith never advised its shareholders of its problems, for these reports are full of descriptions of problems in various markets. As to Canada, for example, there are references to "heavy starting costs" which "unfavorably affected earnings" (1958 and 1959 Reports, A. 2991, 2992); "profits . . . were adversely affected" by governmental action putting the "Canadian dollar at a discount" (1961 Report, A. 2994); and profits were affected by a change in "exchange ratio" and "imposition of additional tariffs" (1962 Report, A. 2995). As to exports generally and in other markets the problems reported include "severe foreign competition from Japan" (1959 Report, A. 2992); "new or more rigid import restrictions," "low labor rates" and "lower priced products" of "foreign manufacturers" (1960 Report, A. 2993); "dollar exchange shortages" (1961 Report, A. 2994); and "[c]ompetition from foreign producers" (1962 Report, A. 2995). Yet *not once* after the 1957 Report was there any mention of alleged Canadian pool interference or threats, later claimed to have been causing such enormous damage during this very period.

Wright was Zenith's president or executive vice president when all these reports were issued (A. 440-41); in fact, he signed the 1959, 1960, 1961 and 1962 reports (Appendix A, A-15, A-19, A-22; PX 62, A. 2851); and Kaplan was financial vice president or executive vice president during that time (A. 523).

These contemporaneous published reports completely destroy the vague, generalized, self-serving testimony of Wright and Kaplan several years later. In *United States v. duPont & Co.*, 353 U.S. 586, 602 (1957), a case in which the contemporaneous documents included annual reports, this Court held that such contemporaneous documents were controlling and no contrary finding by the trial court was permissible:

> "This background . . . , particularly the plain implications of the contemporaneous documents, *destroys* any basis for a [contrary] conclusion. . . ."[52]

So here, the "plain implications" of Zenith's contemporaneous annual reports strongly support and sustain the judgment of the Court of Appeals.

Nowhere in its brief does Zenith attempt to explain the direct conflict between the testimony of Wright and Kaplan and the contemporaneous documentary admissions contained in its annual reports. Instead, it asks this Court to close its eyes to those admissions (Z. Br. 114) and award Zenith millions of dollars of damages shown by those admissions to be unfounded. It urges that the Court rely upon tainted testimony instead of contemporaneous documents because the annual reports are in the record only as an offer of proof. Aside from the question of whether this Court could take judicial notice of these published statements,[53] and aside from the fact that this Court may rely upon offers of proof to sustain the decision of a lower court (in this case the Court of Appeals),[54] it is clear that it was an abuse of discretion for the trial judge to refuse to reopen the proof to receive these annual reports once his attention had

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52. Accord, United States v. U.S. Gypsum Co., 333 U.S. 364, 396 (1948).

53. See Owens-Illinois Glass Co. v. American Coastal Lines, Inc., 222 F. Supp. 923, 927 (S.D.N.Y. 1963), where the court took judicial notice of information in Moody's Industrial Manual, which is based in part on company reports to shareholders. See, *e.g.*, Moody's Industrial Manual at iv (1968).

54. *Cf.* Jaffke v. Dunham, 352 U.S. 280, 281 (1957), where this Court held an appellate court may sustain a judgment based on evidence ruled inadmissible by the trial court. Certainly this Court can similarly consider such evidence to support the decision of the Court of Appeals, particularly when the evidence consists of documentary public statements of the party.

been directed to them prior to entry of judgment. *Smith v. Dravo Corp.*, 203 F.2d 369, 377 (7th Cir. 1953).

In *Marconi Wireless Telegraph Co. v. United States*, 320 U.S. 1, 48 (1943), this Court said that one of the factors a trial court should consider in deciding whether to reopen proof is "whether adequate consideration of the question [at issue] . . . can be had on the existing record, or whether additional testimony should be received." Certainly, once the trial court had been made aware of the direct conflict between the controlling documentary evidence and the testimony, consideration of the question of Zenith's alleged injury in Canada required that this documentary evidence be received.

Zenith argued in the Court of Appeals, and may do so here, that these reports should not be considered because Zenith had no chance to explain them away. The answer to that is that they are conclusive. They "destroy" the Wright and Kaplan story, unless Zenith is now prepared to say these corporate reports by Zenith to its shareholders were not truthful.

The question is a simple one. Can this Court, *as a matter of equity and justice, permit* the award of almost $19 million for alleged damages as to Canada, in the face of the fact that the contemporaneous documentary records of the claimant, whether or not in evidence, show that the claim is unfounded?

**D. The Testimony Relied Upon By Zenith Was Not Credible.**

Zenith argues (Z. Br. 67) that the court below failed to give proper weight to the testimony of Wright and Kaplan that but for the Canadian pool, Zenith could have obtained the same share of the market in Canada as it obtained in

the United States, asserting that this testimony was not denied by any other evidence or impeached by cross-examination. Zenith's criticism of the Court of Appeals is wrong for a number of reasons.

First, the credibility of the testimony of Wright and Kaplan on any material issue is impaired by the record, particularly by the later hearings after the trial. For example, the trial court found that the similar testimony of Wright and Kaplan on recall concerning the market share Zenith could have achieved in England and Australia was "unrealistic" and not "believable" (A. 3525). He thus necessarily concluded either that Wright and Kaplan were not telling the truth, or that they were careless with the truth and given to gross exaggeration to their own advantage. Similarly, the fact that these witnesses were forced on recall to retract their previous testimony concerning the conversion of Zenith television sets to the 405-line English system and the purported attempt at marketing such sets by Zenith's English distributor (see pp. 31-40, *supra*), at the very least, shows either a carelessness of the truth or a willingness to make categorical statements without actual knowledge of the facts. The Court of Appeals also had before it the testimony of these witnesses that they had been aware of the effect of the English and Australian embargoes, yet had led the trial court to believe that the pools had kept Zenith out of these countries prior to the damage period and to adopt Zenith's damage findings on that basis (p. 18, *supra*). These matters, based not on demeanor, but on the record, clearly impeach the credibility of these witnesses.

Second, the credibility of the Zenith testimony as to Canada was directly contradicted by other evidence. For example, Wright's testimony at the trial concerning the alleged curtailment of advertising (A. 490) was impeached

by Kaplan on cross-examination on recall (pp. 111-12, *supra*). As another illustration, the testimony that the United States and Canadian market shares should be exactly identical is impeached by the 1962 Zenith Annual Report *in evidence* which says that Zenith's business in Canada was adversely affected by a change in currency exchange regulations and an increase in the tariff, factors which would not have affected domestic sales (PX 62, A. 725-26, 2850).

The testimony of Wright and Kaplan that Zenith could build up to 20% of the Canadian black and white television market is further impeached by the extra-record statistics and information which Zenith now asserts concerning its sales activities in Canada since the injunction was entered in this case. If the statements in the Appendix to Zenith's brief to this Court and in its Petition for Certiorari can be taken at face value, they show that Zenith's Canadian sales of black and white television sets and radios (the only products involved in this case and in the testimony; see A. 502) actually were *lower in 1967* than they were *in 1960 and 1961*. Zenith's Schedule 2 (Z. Br. A-26) indicates that its total export sales of radio and television sets to Canada in the calendar year 1967 were $12,694,000. Its brief deceptively creates the impression of a substantial sales gain in radio and black and white television by not indicating how much of this total is color television sales. However, in its Petition for Certiorari (p. 10), Zenith said that its 1967 Canadian sales of *color* television sets amounted to $12,260,000. *If this is so then in 1967 its Canadian sales of both black and white television sets and radios combined were only $434,000.* Yet, according to DX 218 (A. 2644), the sum of Zenith's total sales of radio sets and black and white television sets in Canada in 1961 was $3,021,846. Thus, as to both black and white television and radios, Zenith's own figures show that the testimony as to what

Zenith could expect to achieve was inaccurate because instead of building up to a 20% share of the market for those products, Zenith's Canadian sales of those products have declined drastically.[55]

In reviewing the record and findings under Rule 52(a), a Court of Appeals *can* reject testimony when it is inconsistent with other evidence, *Orvis* v. *Higgins*, 180 F.2d 537, 539-40 (2d Cir. 1950); or when it is inherently improbable, *Jackson* v. *United States*, 353 F.2d 862, 865-66 (D.C. Cir. 1965); *Geigy Chemical Corp.* v. *Allen*, 224 F.2d 110, 114 (5th Cir. 1955); or when the testimony is overborne by evidence requiring contrary inferences, *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951); or when considering all of the evidence in the record, the appellate court has a firm conviction that a mistake has been made, *Commissioner* v. *Duberstein*, 363 U.S. 278, 291 (1960); *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

In any event, the testimony, or "guesstimate"[56] of Wright and Kaplan relied upon by Zenith (Z. Br. 67) is not evidence of the fact of damage *in the period relevant to this case*. Neither claimed that Zenith's failure to have 20 per

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55. Moreover, even if Zenith's exports of color television sets to Canada in 1967 were not $12,260,000 as represented in its Petition for Certiorari, the statistics taken from the same public sources relied upon by Zenith in the Appendix to its brief and relied upon by Zenith in preparation of its damage exhibit at the original trial show that Zenith's share of either the total Canadian market of both black and white and color television sets or the Canadian market of the black and white television sets alone could not possibly have reached anywhere near the 20 per cent of the market which Wright testified Zenith could build up to. See Appendix E to this brief, p. A-40, *infra*, which shows that *all* U.S. exports to Canada (including Zenith's) were less than 8% of the 1967 Canadian market.

56. The term "guesstimate" was applied to this testimony by the trial judge (A. 522, 3525-26).

cent of the Canadian market during the four-year period was due to anything occurring during that period or at any time after the release or after April 7, 1960 (see pp. 61-62, *supra*). Instead, both testified only that Zenith would have *built up* to the 20 per cent market share *by the beginning* of the damage period had it not been excluded from the Canadian market for a "great many years" *prior* thereto (Kaplan, A. 3440, 3465; Wright, 3490). But whatever lack of market share and resulting loss of sales and profits Zenith claims to have suffered during the June 1959-May 1963 period, because acts occurring prior to September 1957 had interfered with its gradual build-up of an established market by June 1, 1959, was released and fully compensated for by the RCA settlement (see pp. 47-49, *supra*). As the Court of Appeals held (A. 4261), the effect of the settlement was to release and to preclude recovery by Zenith for damages that might result in the future from activities of the Canadian pool prior to September 27, 1957, the date of the settlement.[57] Zenith does not dispute the principles applied by the Court of Appeals, but instead makes the curious argument that the settlement is an admission of the fact of damage in the years *after* that settlement (Z. Br. 75).

Aside from the fact that Zenith's contention is obviously

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57. As Zenith admits (A. 3035), and the cases confirm, the release of one alleged joint tort-feasor releases all. See, *e.g.*, Dura Elec. Lamp Co. v. Westinghouse Electric Corp., 249 F.2d 5, 6 (3d Cir. 1957). Unless the claimant expressly reserves rights against an alleged co-conspirator, he is precluded from attempting to base a claim against any alleged co-conspirator based on acts prior to the release. Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theatre, 351 F.2d 925, 931 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). The Zenith releases cover future damages from *past* acts, see Sitchon v. American Export Lines, Inc., 113 F.2d 830, 831-33 (2d Cir. 1940), *cert. denied*, 311 U.S. 705 (1940); they do not purport to release damages from *future acts*.

fallacious because the settlement entered into in 1957 could not be an admission that something happened in the period from 1959 through 1963 to injure Zenith, it is hornbook law that the settlement of litigation does not constitute an admission of any kind. See 15 Am. Jur. 2d, *Compromise and Settlement* § 4, 938; *Domarek* v. *Bates Motor Transport Lines, Inc.*, 93 F.2d 522, 526 (7th Cir. 1937); *Hawthorne* v. *Eckerson Co.*, 77 F.2d 844, 847 (2d Cir. 1935); *Lewis* v. *Dixie-Portland Flour Mills, Inc.*, 356 F.2d 54, 57 (6th Cir. 1966).

Zenith concludes its argument on the fact of damage as to Canada by asserting that the Court of Appeals' decision requires that the only way Zenith could prove any damages would be to search out each potential customer in each market and then estimate how much business would have been gained if such customer had not been intimidated by the pool (Z. Br. 75-76). On the contrary, the effect of the Court of Appeals' holding here is that Zenith failed to prove *any* potential customer had been intimidated by the pool in the period for which damages were awarded by the trial court. This long record can be searched in vain for *any* evidence that *any* customer or potential customer, *any* dealer or potential dealer or *any* distributor or potential distributor refused to purchase Zenith's products or in any way cut down on its purchases of Zenith's products in the four-year period asserted in this case by reason of anything done by the patent pool.

Zenith made a similar argument in the Court of Appeals citing this Court's statement in *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690, 698-99 (1962), that the evidence should be viewed "as a whole" and not "by dismembering and reviewing its separate parts." But the point here is that the record viewed as a whole shows *no* damage to Zenith. It was on the basis of the entire record that

the Court of Appeals reached "a firm conviction that the district court made a mistake in inferring from the entire testimony that the essential element of *fact* of damage had been established by Zenith" (A. 4259; emphasis by the court).

## IV. ZENITH'S CONTENTION THAT THE INSTANT DOMESTIC PATENT SUIT AND DOMESTIC LICENSING NEGOTIATIONS INTERFERED WITH ITS CANADIAN EXPORTS IS WITHOUT MERIT.

Zenith argues (Z. Br. 22-24, 71-74) that the pendency of the instant domestic patent suit and the alleged assertion against it by Hazeltine Research of nine U.S. color patents were acts "pursuant to the conspiracy" and that these acts were "directly responsible for the resulting curtailment of Zenith's business" in Canada (Z. Br. 73). These contentions are without foundation. They have been rejected by both courts below, and in fact, were expressly abandoned by Zenith during the trial.

In the course of examination of Zenith's witness Crotty concerning these negotiations and alleged infringement charges by Hazeltine Research on domestic patents, Zenith's counsel expressly disclaimed any connection between those charges and the alleged conspiracy:

> "THE COURT: This I assume is all offered under the misuse theory?
>
> "MR. McCONNELL: Correct, it *didn't have anything to do with the overall conspiracy.*
>
> "THE COURT: I understand" (A. 428).

That Zenith was *not* claiming that the domestic license negotiations affected its foreign business is shown by its post-trial brief on the antitrust issues. In that brief, under

the heading "(a) *Damages Incurred by Zenith as a Result* of Plaintiff's Unlawful Domestic Conduct," Zenith stated:

> "*As a result* of Hazeltine's illegal package licensing activities *and the assertion of patents, including the institution and prosecution of this infringement action and the threat to file other actions* on numerous other patents if the standard package license is not signed, *Zenith has incurred to date expenses of over fifty thousand dollars*" (pp. 39-40).[58]

There was not one word in its post-trial brief or in its proposed findings attributing alleged "curtailment" of its business in Canada to the charges of infringement of Hazeltine Research's domestic patents.

In fact, *the only finding* which Zenith proposed and the trial court entered concerning alleged damages as a result of the domestic suit and licensing negotiations is itself a clear *admission* that those matters did *not* have any effect on Zenith's foreign commerce. Finding XIII states:

> "XIII. As of the date the trial began Defendant [Zenith] *had been injured in its business and property* as the proximate result of the acts and demands of Hazeltine, referred to above, in the amount of $50,065" (A. 2898).[59]

The "acts and demands of Hazeltine" referred to in Finding XIII included the pendency of the suit and the licensing negotiations in question (see Findings VII to XI, A. 2894-98). These "acts and demands" did *not* relate to the foreign pools, which were covered in later, separate findings.

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58. Zenith's post-trial brief was not printed in the Appendix, but is included in the record filed with the Clerk of the Court.

59. This was the amount of legal expense incurred by Zenith in connection with the domestic patent litigation up to December 31, 1963, as testified to by Crotty (A. 550-54).

In other words, not only did Zenith's counsel tell the trial court that the domestic patents "didn't have anything to do with" alleged foreign conspiracies, the *finding* which Zenith itself proposed *confirmed* the fact that the *sole claimed injury to Zenith's "business and property"* up to the time of trial (February 1964) resulting from Hazeltine Research's domestic licensing negotiations and the suit on its U.S. patent was the cost of the domestic patent investigations and this litigation—$50,065.[60] Yet *now* Zenith argues that the injury to "its business and property" from the domestic patent suit and licensing negotiations involves millions of dollars in damage to its Canadian exports.

In addition, the only statements by the trial judge on this subject indicate that he found *no* merit in Zenith's theory that the domestic activities were related to the foreign patent pools, and that had any such finding been submitted to him, it would have been rejected. For example, in the course of the hearing before the trial court on Hazeltine Research's motion to set aside the findings and conclusions, the trial judge indicated his understanding that any charge that the domestic patent activities were related to foreign conspiracies was dropped from the case:

> "THE COURT: Well, certainly in regard to the American patents, *there was no evidence or any charges in*

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60. Based on this finding, the trial court in its judgment of April 5, 1965 (A. 3078-81) included an award to Zenith of $150,000, treble the amount of Zenith's claimed legal expenses. The Court of Appeals affirmed this award based on its concurrence with the trial court's findings of domestic patent misuse in connection with Hazeltine Research's 1962 license offer to Zenith under U.S. patents for color television (A. 4251, 4262). Thus, the Court of Appeals awarded Zenith all the damages it ever claimed as a result of pendency of the instant infringement suit and charges of infringement of domestic patents and neither party has appealed from that award.

> *the pleadings in regard to a conspiracy in regard to the American patents, was there?* I mean, this is strictly put on Hazeltine, on their package deal thing and *Hazeltine had* no co-conspirators in regard to American patents, did they?" (A. 3031).

Further, when counsel for Hazeltine Research explained that Zenith's theory had once been that the domestic infringement suit was detrimental to Zenith's foreign business, the trial judge *expressly agreed* with counsel's comment that the theory "doesn't make much sense" (A. 3032).

Similarly, the Court of Appeals said:

> "Zenith argues that HRI's [Hazeltine Research's] instant infringement suit is in furtherance of the alleged Canadian conspiracy. There is nothing in the record to show that this suit had any effect to damage Zenith's Canadian business. The record shows that this claim was not taken seriously by the district court" (A. 4259).

Thus, both courts below rejected Zenith's contention, and their concurrent determination of the matter adverse to Zenith should foreclose Zenith's contention in this Court. See *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967); *Grover Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275 (1949), *adhered to on rehearing,* 339 U.S. 605 (1950).

Zenith argues (Z. Br. 73) that "the Trial Court was free to draw the inference" that the instant patent suit was "pursuant to the conspiracy," but significantly Zenith cites no reference to where the court in fact drew such an inference. Being unable to cite to any "finding" as authority for its statement that "the trial court *found* that the instant suit was brought in furtherance of the conspiracy" (Z. Br. 71), Zenith relies upon the general language of the trial court's letter to counsel indicating that he was finding for

Zenith on the counterclaim and adopting Zenith's proposed findings. But neither the trial judge's letter to counsel (A. 2857-58) nor the findings submitted by Zenith and adopted by the trial judge (A. 2892-2912) contain a single statement suggesting that the instant patent suit was brought in furtherance of the alleged conspiracies or had any effect on Zenith's foreign business. In fact, the trial court's statement that he understood that there was no conspiracy with respect to domestic patents was made *after* the findings were entered (see pp. 126-28, *supra*).

Moreover, Zenith offered not one bit of evidence during the trial to show that the instant suit or negotiations on domestic patents had any connection with the Canadian pool or any bearing or effect on its exports to Canada or any other country.[61] In an attempt to create the illusion that

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61. Zenith now attempts to create the impression of a connection between the foreign pools and the domestic license negotiations by erroneously asserting that the grant of a license on a U.S. patent would normally grant a license *by implication* under the foreign counterparts (Z. Br. 23, 73). It is firmly established that the rights conferred under a patent license are co-extensive with the rights granted under the patent itself, Cold Metal Process Co. v. United Eng. & Foundry Co., 235 F.2d 224, 229 (3d Cir. 1956), and these rights have no effect in another country that has issued its own patent on the same invention. Boesch v. Graff, 133 U.S. 697, 703 (1890); ALCOA v. Sperry Products, Inc., 285 F.2d 911, 925-26 (6th Cir. 1960), *cert. denied*, 368 U.S. 890 (1961). The only case cited by Zenith (Z. Br. 23, 73), Curtiss Aeroplane & Mtr. Corp. v. United Aircraft Eng. Corp., 266 Fed. 71 (2d Cir. 1920), is *not* contrary to this rule and in fact supports it because the court there acknowledged that:

> "It is admitted that, if the [patented articles] which are alleged to infringe [U.S. patents] had been built in Canada ... *under a Canadian patent*, and then brought into the United States, *infringement would have been made out*. But that is not this case" (266 Fed. at 79).

the record contains something it does not, Zenith asserts (Z. Br. 74) that "as testified to by Wright, Zenith's president, [Zenith] had of necessity to curtail its operations in Canada until the outcome of the instant suit could be determined (A. 453)." The cited page of Wright's testimony may be searched in vain for any such statement or anything supporting it. Wright's testimony there had to do with the notices which the Canadian pool had allegedly been sending out prior to 1957, and his previous requests to the Canadian pool for a license to import. *It had nothing whatsoever to do with the domestic patent litigation.* Zenith makes a similar assertion at page 73 of its brief, saying that the domestic patent suit caused the "*resulting* curtailment of Zenith's [Canadian] business, *testified to by both Wright and Kaplan.*" But Zenith here does not even attempt to cite a record reference as to where they testified that the supposed curtailment *resulted from* the domestic patent litigation. The fact is that neither Wright, Kaplan, nor any other witness testified that the instant domestic patent suit had any effect on Zenith's exports.

Not only is there no evidence or finding to support Zenith's theory but the record affirmatively shows that the circumstances which led to the filing of the domestic patent suit by Hazeltine Research in 1959 were completely unrelated to the alleged Canadian conspiracy. The five-year license granted to Zenith under Hazeltine Research's domestic patents was to expire June 30, 1959, and shortly prior to that expiration, Dodds of Hazeltine Research met with Crotty of Zenith to discuss a possible renewal (A. 434; Finding VII, A. 2894). Four black and white patents were initially brought up but the discussion narrowed down to the '648 patent on which Hazeltine Research later brought the instant suit (A. 438). Zenith was offered a license under that patent, but refused it contending it needed no license

(A. 436, 438).[62] Those negotiations continued for a few months after the license expired (A. 783) until in October 1959, Hazeltine Research served notice of infringement (DX 9, A. 1008), and one month later on November 20, 1959, filed suit for infringement of the '648 patent. Thus, contrary to Zenith's present assertion, these events resulting in the instant domestic patent suit came about solely as a result of the domestic activities of Zenith and were completely unrelated to Zenith's May 12, 1959 meeting with representatives of the Canadian pool.

The negotiations concerning domestic color television patents similarly were unrelated to any supposed activities of the Canadian pool. Zenith was not making color television sets during the negotiations preceding the suit (A. 436), but after it commenced marketing color receivers in the Fall of 1961 (A. 646-47), Zenith and Hazeltine Research commenced negotiations with respect to a possible license under nine of Hazeltine Research's color patents (A. 419-20). Although various licensing proposals were made to Zenith (DX 12, A. 1013-31; DX 15-18, A. 1035-71), negotiations ended in 1963 without agreement on a license (A. 432-34), and Zenith has continued to make and sell color sets. There is no evidence that Zenith has been contacted in any way by the Canadian pool at any time since it has been making and selling color sets.

Lacking any evidence of a connection between these

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62. Although it never expressed any such concern during the negotiations, Zenith now claims that it faced a "serious" dilemma in that if it took a license under Hazeltine Research's domestic patents, it "thereby admitted the validity of all the foreign counterparts" of those patents (Z. Br. 74). The licenses offered to Zenith by Hazeltine Research, including DX 2 (A. 955, 971) cited by Zenith, contain no such requirement, and Zenith cites no legal authority to support its contention.

domestic patent matters and the discussions between Zenith and the Canadian pool, Zenith attempts to create an illusion of some connection by implying that one of the Canadian patents discussed in Zenith's May 1959 meeting with representatives of the Canadian pool was the counterpart of the U.S. patent on which Hazeltine Research brought suit (Z. Br. 21-22, 72). But the fact is that Zenith's own vice president Crotty, who attended the meeting, testified that the Canadian patent discussed was *not* the counterpart of the patent in suit (A. 438). The facts reviewed above show that the instant suit was brought because of a breakdown in the domestic negotiations between Zenith and Hazeltine Research and not, as Zenith suggests, to carry out any supposed threat by the Canadian pool.

Zenith attempts also to create the impression that Dodds, counsel for Hazeltine Research, in his opening statement at the trial "admitted" that there was a connection between the domestic patent litigation and Zenith's meeting with the Canadian pool representative in May 1959 (Z. Br. 22, 72). This is a distortion of Mr. Dodds' comments. At the place quoted in part by Zenith (A. 131-32), Dodds was explaining that the foreign patent pools in the foreign countries could not stop Zenith from importing and selling television receivers in their respective foreign countries without first bringing a successful infringement suit on the foreign patent or patents held by the pool. Noting that it was "the same as if you infringe a patent in this country," he gave as an analogy Hazeltine Research's pending action in the United States, saying:

> "And we can't prevent Zenith from selling sets without an adjudication, which we are in the process of trying to get now. We believe they infringe" (A. 132).

He was obviously referring to stopping sale *in the United States* by obtaining an adjudication on the U.S. patent in

suit which Hazeltine Research believed Zenith infringed, and was *not* suggesting that a U.S. adjudication could prevent sales *in Canada*. His point was simply that, just as Hazeltine Research could not stop Zenith from selling in the United States except through a successful infringement action in the United States, a foreign patent pool could not stop Zenith from selling in that country without bringing and successfully prosecuting a patent infringement suit on a patent of that country. The distortion of counsel's statement by Zenith merely emphasizes the lack of merit in its position.

Finally, there is no merit in Zenith's suggestion that Canadian courts will automatically recognize the validity of Canadian patents when their American counterparts have been upheld in American courts (Z. Br. 72). In its brief to the court below and in its Petition for Certiorari to this Court, Zenith argued that this claim was supported by the case of *Nu Tec, Ltd.* v. *Hearst*, 38 Ont. Weekly Notes 2 (1930), a decision which we pointed out was *reversed* on appeal in *Nu Tec, Ltd.* v. *Hearst*, 39 Ont. Weekly Notes 110 (1930). In reversing, the Canadian appellate court held a Canadian patent *invalid* despite the fact that the U.S. counterpart of that patent had been held *valid* by a U.S. district court.[63]

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63. The other cases cited by Zenith for this proposition at best state only that a U.S. judgment buttresses the presumption of validity created by the issuance of patents in both Canada and the United States. For example, in American Arch Co. v. Canuck Supply Co., 3 Dominion Law Reports 567 (1924), quoted incompletely by Zenith (Z. Br. 72), the Court said: "A strong presumption in favor of the validity of the [Canadian] patent is created *by the issue of the Canadian and the United States patents and* by the judgment [of the U.S. court] herein above referred to" (3 Dominion Law Reports at 571). In its quote from this passage, Zenith omitted entirely the portion we set out in italics.

Zenith's argument that the charges of infringement on domestic patents were acts in furtherance of the Canadian pool is pure fiction writing. It is an attempt by Zenith again to change its position with respect to alleged damage-causing acts and resurrect a theory of recovery on which it offered no evidence, which it expressly abandoned in the trial court and in its proposed findings, and which was found to have no evidentiary support by both the trial court and Court of Appeals.

## V. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT ZENITH SUFFERED NO INJURY AS TO AUSTRALIA.

With respect to Australia, the Court of Appeals concluded:

> "No specific findings were made with regard to how the alleged conspiracy prevented sales by Zenith in Australia. We see no necessity of discussing at great length Zenith's failure to prove the *fact* of damage with respect to the Australian market, since there is no testimony that could reasonably support a finding of *fact* of damage there. Until April, 1960, Australian government regulations prevented Zenith's selling radio and TV sets in that country. Zenith's case rests on the testimony of its officers that conversations between Zenith employees and Australian businessmen who were not members of the patent pool led it to believe that it could not obtain a license to import radio and TV receivers into Australia after 1960. There is no evidence that Zenith ever attempted to obtain a license from the Australian pool, nor is there any proof of use by the Australian patent pool of restrictive license forms to prevent import. Indeed, during the post-1960 period a large number of low priced Japanese radio and TV sets were sold in Australia. Actually, high import duties and shipping costs posed a formidable barrier to Zenith sales. There is

no evidence to warrant the inference that Zenith intended to or was prepared to enter the Australian market. *Triangle* v. *National Elec. Prod. Co.*, 152 F. 2d 398; *Volasco Prod. Co.* v. *Fry Roofing Co.*, 309 F. 2d 383, 395" (A. 4256-57; emphasis by the Court).

In its brief, Zenith pays minor attention to the matters referred to by the Court of Appeals in reaching its conclusion that there was a total failure of proof of the fact of damage in Australia. Instead, its argument is directed primarily to an attempt to show that the patent licenses offered by the pool do not mean what they say, and to an attempt to show that the court below "ignored" certain "facts" and relied on offers of proof. We shall discuss first the licensing agreements, and then Zenith's other miscellaneous arguments.

**A. Patent Licenses Without Import Restrictions Were Available to Zenith from the Australian Pool Since 1951.**

We have pointed out in the Statement of the Case (pp. 64-65, *supra*) that the Australian pool offered *two* types of licensing agreements: the whole-number license forms (*e.g.*, License No. 6, DX 193, A. 2438-51) which were offered by the pool to *manufacturers*, and thus available to Zenith; and separate forms bearing the same number but followed by the suffix "B" (*e.g.*, License No. 6B, DX 194, A. 2452-63) which were issued for the same periods of time to local assemblers (A. 804-06).

The "B" license forms offered to local assemblers did contain, and continued to contain, provisions requiring the licensee to agree not to export or sell or offer for sale any radio and television receivers not manufactured in Australia (see p. 65, *supra*). Although similar provisions had appeared in *early* whole-number license forms, which were

issued to manufacturers (see, *e.g.*, DX 189, A. 2395, 2400), these restrictive provisions were expressly *deleted* from the license agreements *available to manufacturers* such as Zenith, *beginning January 1, 1951.* Thus, License No. 5, available from the pool during the period January 1, 1951 to June 30, 1953 (DX 192, A. 2425-37), does not contain these restrictions (see A. 2430), and neither does License No. 6 available during the period July 1, 1953 to June 30, 1958 (DX 193, A. 2438-51, see 2443) (see also p. 65, *supra*). These license forms are in evidence and are Zenith's own exhibits.

In the trial court, Zenith created the impression that all Australian pool licenses had the terms and provisions of the "B" license. In fact, Zenith asserted that it was the "only form" in use. That this was Zenith's tactic is expressly revealed at page 90 of its post-trial brief to the trial court on the antitrust issues.[64] Zenith there asserted that "the *only form* of license agreement issued by the pool" was "the standard pool license, which imposes the restrictions" and it then quoted from paragraphs 4(a)-(b) of this so-called standard license specifically identifying these paragraphs as being contained in "(*License No. 7B*, dated 1961—Def. Exh. 195)."[65]

This misrepresentation of the record was carried over into the findings adopted by the trial court without change.

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64. Zenith's post-trial brief is not printed in the Appendix, but is part of the record on appeal filed with the Clerk of the Court.

65. Zenith persists in these tactics even in this Court. In the Appendix to its brief (A-18) where it purports to set forth citations supporting Finding XXXIV that the standard license required the licensee "to agree not to export or import," it lists exhibits 188, 189, 191, 194 and 195 and *omits* reference to exhibits 192 and 193 (A. 2425-51), which are the relevant No. 5 and No. 6 license forms.

Finding XXXIV stated that licensing by the pool is by a "standard package license" which is stated to be "the *only form* of license agreement *issued* by the Pool" and that the standard form "requires the licensee to agree not to export or import or sell or offer for sale in Australia any radio or television receiving apparatus not manufactured in Australia" (A. 2907).

The Court of Appeals was not misled and correctly pointed out "nor is there any proof of use by the Australian patent pool of restrictive license forms to prevent import" (A. 4256).

Zenith does not deny that the manufacturer's license form was available to it but instead makes two spurious arguments in an attempt to avoid the effect of the clear proof that in 1951 a fundamental change permitting imports was made in the license forms.

*First,* it asserts manufacturer's License No. 7 was the only evidence that the restrictions on imports had been removed, and points out that this was an offer of proof (Z. Br. 89). But the removal of the restrictions *beginning in 1951 had already* been established by Licenses No. 5 and No. 6 (DX 192 and 193, A. 2425-51), which were put in evidence by Zenith. License No. 7, which covered the period from January 1, 1961 through December 31, 1965 (Offer of Proof, A. 2970-71, 2977), was offered merely for the purpose of bringing the license forms up-to-date.

*Second,* Zenith argues that other provisions in License No. 7, while not expressly restricting imports by the licensee, nevertheless make it "abundantly clear" that this was the unexpressed intent (Z. Br. 89-90). For example, it points to a provision in License No. 7 calling for the licensee to affix a patent plate reciting that the "instrument was manufactured under a Licence" (A. 2977) granted by the

pool, and argues that it follows from this that the licensee was not permitted to import (Z. Br. 90).

The logic of this argument is somewhat obscure to say the least. For example, if the provisions on which Zenith relies were intended to have this meaning, why were express restrictions on imports included in the "B" forms for local assemblers, for those licenses have the same provisions on which Zenith relies, including the identical patent plate requirement (*e.g.*, License 7B, DX 195, A. 2464-75, see A. 2464, 2469-70). Moreover, Zenith's tortured argument assumes that the deletion in 1951 from the manufacturer's license of the paragraphs restricting imports was not intended to have any effect.[66]

The clear documentary proof that a change was made in the pool license in 1951, taking out the prohibition against imports, cannot be overcome by such bald assertions as "the Pool has never granted a license to import American sets into Australia" (Z. Br. 36). The exhibits cited by Zenith as support for this statement are the various blank license forms *including Licenses No. 5 and No. 6* (DX 192, 193, A. 2425, 2438) from which the provision requiring the licensee not to import had been stricken. Furthermore, there is no evidence in the record to indicate that licenses have been refused to American companies or that since 1951 any American company ever asked for or desired a license.

Similarly without merit is Zenith's assertion that "Hazeltine patents" have been in the pool "for 35 years" and *"during all this time* have been licensed in such a way as to

66. Such an assumption is contrary to settled rules of contract construction as we pointed out at p. 97, *supra*, where we discussed Zenith's similar argument with respect to licenses offered by the British pool.

*preclude and exclude any imports* of radio or television sets into Australia" (Z. Br. 36). Its only support for this assertion is a memorandum dated *April 5, 1939!* (DX 197, A. 2482). Moreover, the Australian Government statistics put in evidence by Zenith affirmatively disprove this contention. Those statistics show that during the 1960-64 period over 500,000 radios and over 2,700 television sets *were imported* into Australia from Japan alone (see p. 67, *supra*). It is obvious therefore that the pool did not "preclude and exclude any imports of radios or television sets into Australia" as claimed by Zenith.

Finally, Zenith's assertion that the Court of Appeals "conced[ed] that a conspiracy existed in . . . Australia" (Z. Br. 85-86) distorts beyond recognition the holding of the Court of Appeals. Leaving aside the fact that the court specifically limited its holding to Zenith's total failure to prove injury, it also found that there was no proof "of use by the Australian patent pool of restrictive license forms to prevent import" (A. 4256). If the licensees were not prohibited from importing, there could be no unlawful conspiracy.

**B. Zenith's Other Attacks on the Conclusions of the Court of Appeals Are Similarly Unfounded.**

Zenith asserts that the decision of the Court of Appeals "ignores the fact . . . that Zenith sought distributors in Australia but was unable to obtain them because of the Pool" (Z. Br. 86). However, the trial court made no finding that the pool in any way prevented Zenith from obtaining distributors or that Zenith sought any distributors in Australia, and the testimony of Wright (A. 476) relied on by Zenith provides no support for such an assertion. Wright said that he had talked with "many people in Australia with a view to distribution" and "there was no question in *their*

mind" that Zenith could not get a license to import (A. 476). However, Wright admitted that he did not talk to anyone from the pool concerning a license permitting imports (A. 476) and both Wright and Kaplan admitted they knew of no request to the pool for a license within the twenty-year period before they testified in 1964 (A. 476, 540-41).

This testimony demonstrates Zenith's lack of interest in the Australian market. It is simply not believable that Zenith, without making a direct inquiry to the pool, relied instead on the views of others that a license for importing was not available, and then stayed out of the Australian market and lost substantial profits every year. If Zenith had been suffering the losses it now claims, it is incredible that it would not once after the 1930's, or at least after the governmental embargo was lifted in 1960, make some inquiry to the pool concerning a license. When the embargo was lifted, Zenith could have imported to Australia, and if it had checked with the pool, it would have found that such a license had been available since 1951 (see pp. 64-65, *supra*).

Zenith also asserts that the Court of Appeals "retried the damage issue in . . . Australia *de novo*, not on [the] basis of the original record but apparently relying largely on offers of proof . . ." (Z. Br. 85), mentioning only the court's statement that "high import duties and shipping costs posed a formidable barrier to Zenith sales" (Z. Br. 88). The fact is that Australian statutes and orders showing the prohibitive import duties and tariffs were identified by an Australian Government official during the embargo hearings and received in evidence (A. 3119, 3144-60). The trial judge ultimately did not consider them because he

refused to consider the market share issue after the embargo was proved, but these statutes and orders were in evidence.

Moreover, while the Court of Appeals noted that the import duties and tariffs were indeed a formidable barrier to Zenith sales,[67] its decision was based upon a review of the entire record as to Australia as shown by the detailed discussion in its opinion (pp. 133-34, *supra*). We submit that the conclusion of the Court of Appeals that Zenith had not "been injured in its business by the activities of the alleged unlawful conspiracies in Australia" (A. 4257) was the only conclusion possible on this record.

## VI. THE COURT OF APPEALS DID NOT HOLD THAT A DEMAND BY ZENITH FOR A LICENSE WAS NECESSARY.

Zenith argues (Z. Br. 91-96) that the Court of Appeals held that Zenith had to make a "perfectly useless and futile demand of the respective pools" for a license to import (Z. Br. 92) and that decisions of this Court indicate that such a demand is not necessary, citing *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690 (1962) and *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

The Court of Appeals made no such holding. The court merely referred to the fact that Zenith had not requested a license as being among many factors which when taken together showed that Zenith was not interested in a license because: (a) it had no intention and was not prepared to export to *Australia* (A. 4256-57); (b) it did in

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67. In contrast to Wright's testimony that the tariff in Australia was 20 per cent or 30 per cent and possibly "lower" (A. 467), the tariff in 1963, for example, was 45 per cent plus $55.50 which alone would almost double Zenith's price (PX 71, A. 3150, 3272, 3277-78).

fact ship to and sell in *Canada* tens of thousands of radio and television sets without a license and without interference by the pool and indeed claimed to be fully licensed as a result of the 1957 settlement to the extent it used any patents administered by the Canadian pool (A. 4258); and (c) Zenith and its distributor in *England* were awaiting the change to the 625-line television system—"until such time naturally we cannot start marketing" television sets (DX 112, A. 1593; A. 4257)—and Zenith had been importing radios into England since the lifting of the government embargo *without* a pool license and without interference from the pool (Finding XXII, A. 2901-02, A. 4257).

It may not be necessary for a claimant to prove a demand and refusal if it is shown by other facts and circumstances that such claimant desired a license and that a demand would have been futile. But the absence of a request for a license from the pools under the undisputed facts and circumstances of this case is strong evidence that Zenith did not desire a license. It is inconceivable that any company suffering the millions of dollars in damages Zenith now claims to have been suffering because it did not have a license from the patent pools would not at least once after the settlement of the *RCA* case have requested a license from at least one of the pools. Zenith says that Wright talked with numerous people about Australia (Z. Br. 91) but Wright admitted that he had never talked with anyone connected with the pool (A. 476) (see pp. 63-64, *supra*). Zenith does not deny that it made no request or inquiry of the English pool after either the RCA settlement or the lifting of the government embargo. Zenith implies that it requested a license from the Canadian pool in the May 12, 1959 meeting (Z. Br. 91), but there is no evidence that Zenith requested a license at that meeting or was aban-

doning its position that it needed no license from the pool (see pp. 53, 101-02, *supra*).

Zenith is claiming over $15 million in treble damages as to England and Australia based on its after-the-fact construction of the Australian and English license forms. A simple request to the pools in those countries would have made reliance upon such strained *ex parte* constructions unnecessary. However, despite a hiatus of twenty years following the beginning of World War II, during which time the whole question of imports was rendered moot by governmental embargoes, and despite changes in the pool licenses in both countries eliminating the prohibition on imports, Zenith has not even *inquired* of the pools whether their licensing policies would in fact permit the granting of a license to import radio and television sets (see pp. 44-46 and 63-65, *supra*).

Under the circumstances here, if the Court could not take into account the fact that no request had been made, someone who did not want or need a license and would not have taken one if offered (such as Zenith in Canada) or who was not in fact interested in importing (such as Zenith in Australia and in England as to television) could sit back for years (as Zenith did here) and then assert a right to damages on the claim that no license had been available to it.

All this Court held in *Continental Ore* and *Hanover Shoe* was that, under the particular circumstances of those cases, a demand was not a legal prerequisite to recovery. Nothing the Court of Appeals said here is inconsistent with those decisions. The Court of Appeals here did not hold that a demand was necessary, but merely included the absence of a request as one of a number of facts it considered.

## VII. THE COURT OF APPEALS REACHED ITS DECISION WITHOUT RELIANCE UPON OFFERS OF PROOF.

Zenith argues (Z. Br. 113-15) that in determining that the trial court's fact of damage findings were erroneous, the Court of Appeals utilized offers of proof. However, the opinion of the Court of Appeals neither refers to nor relies upon offers of proof, and Zenith's so-called "examples" show nothing to the contrary.

The first example given by Zenith is the Court of Appeals' statement: "nor is there any proof of use by the Australian patent pool of restrictive license forms to prevent import" (A. 4256; Z. Br. 114). The Court of Appeals there is talking about the absence of proof, not about any offer of proof.[68]

The second example is a comment made by the court concerning Australia that "Actually, high import duties and shipping costs posed a formidable barrier to Zenith's sales" (A. 4256; Z. Br. 114). Kaplan himself recognized during his testimony at the original trial that shipping costs to Australia could run as much as 6 per cent (A. 531), which is no small amount when it is considered that Zenith's profits on its substantial exports to Canada in the period of 1960 through 1963 ranged from about 3.9 per cent to a high of about 9 per cent (DX 218; A. 2642, 2644-46). The statutes and regulations showing the prohibitive Australian tariff were received in evidence (p. 139, *supra*).

The final example which Zenith cites (Z. Br. 115) is a statement by the Court of Appeals that "Significant barriers other than patent difficulties operated to prevent

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68. As previously noted (p. 135, *supra*), pool licenses which did not prohibit imports *were in evidence.*

sales of Zenith TV receivers in England . . . Zenith sets sold in England would be in competition with substantially lower priced British sets" (A. 4257). Zenith's contention that this statement rests upon post-trial offers of proof is not correct. The average price of Zenith sets is shown by Zenith's exhibit 220 (A. 2661) to be about $143.00 F.O.B. Chicago. The average price of English-made television sets with which the Zenith imports would be competing can be calculated from statistics of the English government put *in evidence* by Zenith and relied upon by Zenith in preparing its damage exhibit (DX 216, A. 2600, 2602). Calculating the average price of English sets from those exhibits in exactly the same manner as Zenith calculated the average price of its sets, it can be seen that the average price of television sets sold by English manufacturers ranged from about $90 to $96. Adding only the minimum English tariff of 20 per cent, as testified to by Kaplan (A. 529), and *not* taking into account shipping charges, the cost of converting the sets or a distributor-importer's profit, the average Zenith price becomes about $171, almost double the average English price. All this, which rests solely on evidence in the record, was pointed out at pages 104-05 of Hazeltine Research's brief in the Court of Appeals.

Zenith's contention that the Court of Appeals relied upon post-trial offers of proof thus finds no support in the opinion of the Court of Appeals. Indeed, the basis for the conclusion of the Court of Appeals was the *deficiency* in Zenith's proof, *i.e.*, Zenith's *failure to prove* the essential fact of damage.

## VIII. ZENITH'S ARGUMENTS AS TO THE AMOUNT OF DAMAGES ARE ERRONEOUS AND RAISE AN ISSUE NOT BEFORE THIS COURT.

Zenith argues the subject of the alleged *amount* of damages in England, Australia, and Canada (Z. Br. 26-28, 53, 56, 76-85), but that issue is not before this Court. Although

it was raised in the Court of Appeals, it was not decided for that court based its decision entirely on the failure of Zenith to prove damaging impact from pool activities. The issue of the amount of damages is also outside the scope of issues raised by Zenith's Petition for Certiorari.

If this Court should conclude, contrary to our contentions, that the judgment of the Court of Appeals should be reversed, of course the case should be remanded to the Court of Appeals to consider the issue of the amount of damages, as well as the other undecided issues. In order that the Court may realize the important issues unresolved and the absence of any credible evidence as to the amount of damages, we feel it is appropriate to point out some of the errors of the trial court in deciding this issue.

### A. England and Australia

We have shown (pp. 18-25, *supra*) that Zenith's Market share estimates and exhibit 220, which was the only evidence as to amount of damages at the original trial, were discredited by the later proof of the embargoes, the recall testimony of Wright and Kaplan attempting to reconstruct exhibit 220, and the findings of the trial court that the estimates were "unrealistic" and "not believable." This left the record with *no credible evidence* as to the amount of damages in either England or Australia. However, the trial court refused either to dismiss the counterclaim or to hold the promised further hearings on amount of damages, even though Hazeltine Research stood ready to present extensive economic and marketing evidence which would show that Zenith could have expected to make no meaningful penetration of either market.[69]

69. When the trial court refused to permit further hearings this evidence was presented as an offer of proof (A. 3527, 3540-44). This extensive Offer of Proof on Market Share and Damages is printed in Volume VIII of the printed Appendix (A. 3550-4129).

Instead, because he was anxious to bring the case to a conclusion (A. 3527), the trial judge devised his own damage formula which was without any basis in the record and which utilized the discredited DX 220. After first saying that Zenith should not expect any profits in the first year of entry into a new market, the trial judge said that for the second year Zenith's damages would be "50 per cent of those *indicated* for the second period on Chart 220;" that for the third year they would be "75 per cent of the profits *indicated* . . . in the last column on 220;" and that for the fourth year they would be "100 per cent of the amount *indicated* on the lost profit or loss-of-sales item in the last column on Exhibit 220" (A. 3526). Thus, the trial judge not only devised an arbitrary formula (0%-50%-75%-100%) which had no basis in the record, but he proceeded to apply it to DX 220 in a manner which assumed that the figures shown on that exhibit *for each accounting period* were claimed by Zenith to represent its expected sales and profits *in that accounting period*. But these figures could not be used as a basis for any damage computation for any particular period because Kaplan testified on recall that *no figures* for *any individual period* were intended to reflect what Zenith could have done during that period (pp. 22-24, *supra*).

Thus, on the issue of the amount of damage with respect to England and Australia, the trial judge committed reversible error in at least three respects:

(1) once he concluded that the only Zenith testimony on the issue was unrealistic and not believable, it was error not to dismiss the counterclaim with respect to England and Australia on the ground that Zenith had failed to prove the amount of its alleged damages by any competent evidence;

(2) it was error to award damages on the basis of a formula which had no evidentiary basis; and

(3) at the very least, once the proof had been reopened and Hazeltine Research had established the embargo and the Zenith testimony had been discredited, it was an abuse of discretion to refuse to permit Hazeltine Research to go forward with its proffered evidence on Zenith's alleged damages.

## B. Canada

Similarly, there is *no evidence* from which the amount of Zenith's alleged damages as to Canada could be determined. The Wright and Kaplan estimates which were the basis of Exhibit 220 and ultimately the Canadian judgment, were based upon the assumption of the right to collect a second time for interference which occurred prior to the September 1957 releases and to collect for interference which occurred prior to the May 22, 1959 beginning of the four-year statutory period and prior to the April 7, 1960 cut-off date established by the Crotty affidavit. Both Wright and Kaplan testified that Zenith's failure to have the same share of the Canadian market during the four-year period as it had in the United States was due to pool interferences with Zenith's market buildup going back "for many years" (see pp. 20-21, *supra*). In fact, Wright testified that the interference began as early as 1927, when Zenith was allegedly refused a license permitting imports (A. 451-52). Even if we assume arguendo that there was interference after the 1957 release and that there was interference within the four-year period and after the April 7, 1960 filing of Zenith's answer, there is absolutely no evidence in this record showing or estimating the amount of damages from such interference and there was no finding of such damages by the trial court.

The release in September 1957 wiped the slate clean. Thus, any method of estimating the amount of damages

would have to be based on the market share Zenith might expect to develop *first entering the market* after September 1957. Assuming that Zenith entered the market in late 1958, as it did, no witness estimated what Zenith's share of the market would have been in the 1959-1963 period had Zenith been free of the supposed pool interference after the release.

The same principle would apply with respect to the cut-off date established by Zenith's motion for leave to file the counterclaim and the Crotty affidavit (see p. 7, *supra*). That is, having said that the proximate cause of its damages were acts which occurred since April 7, 1960, Zenith's burden was to show the amount of damages which flowed from those acts; but it made no attempt whatsoever to estimate *what the growth in its market share* would have been after April 7, 1960, and there is no trial court finding as to the amount of damages caused by anything occurring after that date. Of course, we have pointed out in the argument on the issue of the fact of damage that there were no such acts.

If, as Zenith has asserted, the U.S. market forms a basis of comparison, the only such comparison which would have any value would be one which utilizes Zenith's experience when it first entered the U. S. television market and not its experience in 1959-1963 after it had been in that market for many years. By 1959, Zenith had been in the U.S. radio market for about thirty-six years and in the television market for eleven years (see p. 62, *supra*). Obviously, Zenith could not expect to *start* business in Canada with the same market share it took many years to develop in the United States.

Zenith's beginning experience in the television market in the United States is shown by statistics which Zenith itself had compiled as an interrogatory answer in the RCA-Zenith litigation (Offer of Proof, para. V., A. 3563-65). Aside from

the 1962 fall-off caused by the increase in the Canadian tariff and change in the exchange ratio (PX 62, A. 2850), Zenith's results in the Canadian television market were comparable to its experience in the first four years in the U.S. television market (A. 3563-65). In its third full year in the U.S. television market (1951), Zenith had approximately 5.1 per cent of the market (A. 3564), not materially different from the 4.9 per cent it achieved in Canada in 1961, its third full year in that market (DX 220, A. 2661).

## IX. THE CHARGE OF UNLAWFUL CONSPIRACY.

Zenith asserts that the Court of Appeals conceded "that a conspiracy existed in both England and Australia" (Z. Br. 85-86), and that Hazeltine Research conceded unlawful conspiracies and participation therein (Z. Br. 98, 25). But the Court of Appeals did not pass on the question of whether the patent pools constituted unlawful conspiracies or whether Hazeltine Research, or its parent Hazeltine Corporation, were parties thereto. On the contrary, the court was careful to use the words "*alleged* conspiracies" when referring to the pools (A. 4254, 4256, 4257, 4259) and said that since the fact of damage had not been proved, "We need pass on no other contention . . ." (A. 4254).

Similarly, Hazeltine Research has made no such concession. Zenith all through this litigation has pursued the approach that a "patent pool" is *per se* unlawful, and a statement that patents are in a "pool" is treated as being an admission of participation in unlawful conduct. No citation of authority is required to point out that a "patent pool" may be a completely lawful arrangement under the Sherman Act, and that in the case of the English, Australian and Canadian patent pools, the question is whether they were in fact restrictive and had an impact on Zenith's

foreign commerce during the alleged damage period.[70]

We comment on this question, not for the purpose of arguing this issue which is not before the Court, but only to respond to Zenith's attempt to create the impression that Hazeltine Research, and its parent, were and continue to be willfully engaged in unlawful conspiracies, designed to throttle the foreign commerce of Zenith and others in the American electronics industry (*e.g.*, Z. Br. 59).

### A. England and Australia

The patents of Hazeltine Corporation issued in England and Australia were licensed or conveyed to corporations in those countries. These corporations licensed or otherwise made the patents subject to patent pools. The Hazeltine Corporation English patents were licensed to General Electric Company Limited of England which placed them under the English pool agreement (A. 344, 350). The Australian patents were owned by Neutrodyne Proprietary Ltd., an Australian company in which Hazeltine Corporation has a stock interest (A. 93, 252-53), and Neutrodyne licensed the patents to the Australian Radio Technical Services and Patents Company Prop. Ltd. (A.R.T.S.) (A. 275; DX 184, A. 2357).

In times past, the pool licensing policies were protective of local manufacture and patent licenses prohibited impor-

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70. In this connection, Zenith's brief twice makes reference to a statement by a counsel for Hazeltine Research in argument on the motion to set aside the findings (Z. Br. 16-17, 98), where he stated that so far as he knew the "pools" were still in existence. This, of course, was not an admission of illegality or of damage to Zenith. In fact, the purpose of the motion to set aside the trial court's findings (A. 2939-51), then being argued, was to point out to the trial court that the pools were not restrictive to and had no impact on Zenith's foreign commerce.

tation by the licensee. This was, of course, an expression of nationalistic interest, and these practices are not shown to have been violative of the laws of either country. However, it also appears on the face of the record that the *policies of these pools changed* prior to any period relevant to this lawsuit, to provide for the granting of patent licenses which did not prohibit imports (see pp. 44-46, 64-66, *supra*).

In the case of A.R.T.S., the Australian pool, this change came at least as early as January, 1951. Thereafter patent licenses not prohibiting imported radio and television sets were available (pp. 64-66, *supra*).

In the case of England, the last pool license form to contain an agreement by the licensee not to import expired December 31, 1957, and the only license form in evidence after that date had that provision deleted (see pp. 44-46, *supra*). As shown by offer of proof (A. 3701-06) the change came January 1, 1958, which was shortly after the Zenith-RCA settlement; but whether or not this change resulted from the settlement, the fact is that the British pool did change its policy on that date, and abandoned the policy of protecting local industry which it had followed previously.

The applicable law was set forth in *United States* v. *ALCOA*, 148 F.2d 416, 443-44 (2d Cir. 1945), where the Second Circuit sat by designation for this Court. It was there held that foreign agreements involving foreign participants and foreign activities do not constitute conspiracies in violation of the Sherman Act, even if intent to affect foreign commerce were present, unless such agreements do *in fact* have an effect upon United States foreign commerce. See also *United States* v. *Minnesota Mining & Mfg. Co.*, 92 F.Supp. 947, 958 (D.Mass. 1950). It is clear

that in both England and Australia there were governmental embargoes lasting until June, 1959 in England and April, 1960 in Australia which constituted a complete bar to imports of radios and television sets from the United States (see pp. 16-18, *supra*). Both the English and Australian pools had changed their policies on the matter of import restrictions prior to the lifting of those embargoes. Thus, there could have been no effect on United States foreign commerce and hence no Sherman Act violation at any time since 1939 because the governmental embargoes prevented imports from the United States from that date until *after* the date the pools terminated restrictions on imports.

Further, the English pool agreement expired by its terms June 30, 1964 (DX 60; A. 1272), and was not renewed (Offer of Proof, A. 3700-03). Also the Hazeltine Corporation patents are no longer licensed to General Electric of England. Hazeltine Corporation itself controls its English patents and Zenith has been so advised (see p. 157, *infra*).

### B. Canada

Hazeltine Corporation's patents were (but no longer are) licensed by it to Canadian Radio Patents Limited (CRPL). Hazeltine Corporation has never been a member of CRPL (see pp. 5-6, *supra*).

It is true that CRPL had a policy of not licensing imports. However, there was no showing that it had any actual effect on U.S. exports to Canada after the RCA settlement. In addition, Hazeltine Corporation understood that under Canadian patent law it was essential to limit imports of articles made under Canadian patents to avoid action by the Canadian Patent Commissioner for "abuse" including possible forfeiture of the patents.

Section 67 of the Canadian Patent Act (PX 49, A. 2787) provided that a patent was considered to be abused if the "working of the invention within Canada on a commercial scale is being *prevented or hindered by the importation* from abroad of the patented article by the patentee or persons claiming under him" (*i.e.*, licensees) (Section 67 (2)(b), A. 2789). Working on a commercial scale is taken to mean sufficient local production to be reasonably close to meeting the Canadian demand (A. 672). Under Section 68 (A. 2790) it was provided that the Commissioner of Patents has certain powers in "case of abuse" even to "order the patent to be revoked" (Section 68(d), A. 2791-92). The operations of CRPL were found by a Royal Commission to be lawful under Canadian law (A. 683; PX 50A, A. 2811, 2829-34).[71]

While Zenith argued and convinced the trial judge that the Canadian law did not require the pool's policy, it did recognize that the question is not free of doubt for the finding proposed by Zenith and adopted by the trial court, read:

> "XXXII. The proofs establish as a fact that *in the circumstances of this case* the Canadian Patent Act does not require the Pool to refuse to license importation, as contended by plaintiff. Nor does the Act penalize in any way a patentee who licenses for importation *where*, as in this case, *there is being carried on extensive manufacturing in Canada* under its patents" (A. 2906).

Thus, in this finding, Zenith tacitly recognizes that there were circumstances where the refusal to license imports would be proper.

Hazeltine Corporation had relied on its understanding

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71. That it was the purpose of the Canadian government to protect local industry is apparent on a reading of excerpts from the Patent Act (PX 50, A. 2799-2808).

of the effect of the Canadian Patent Act. However, although the decision of the trial court concerning the effect of the Canadian Patent Act is subject to question, Hazeltine Corporation immediately took steps to secure a modification or termination of its license agreement with CRPL. Hazeltine Corporation secured an early termination of its license agreement with CRPL, and has been prepared to and has entered into agreements covering one or more of its Canadian patents as the other party may see fit with no restrictions on imports, recognizing that it does run the risks created by the Canadian Patent Act. This is set forth in more detail at p. 159, *infra* and in the affidavit of David Westermann, President of Hazeltine Corporation, Appendix C to this brief."[72]

As stated above, in presenting the foregoing Hazeltine Research is not arguing the legality or illegality of the patent pools which is an issue not before this Court. Rather, it has presented these facts to point out the reasons for and good faith of the conduct of Hazeltine Corporation in view of the repeated suggestions by Zenith that Hazeltine Research and its parent are willful wrongdoers.

## X. THE COURT OF APPEALS' VACATION OF THE INJUNCTION AS TO FOREIGN COMMERCE WAS CLEARLY CORRECT.

Zenith attacks (Z. Br. 96-101) the action of the Court of Appeals in vacating Paragraph C of the injunction, drafted by Zenith and adopted by the trial court on April 5, 1965. This paragraph prohibits Hazeltine Research and Hazeltine Corporation from:

"C. Entering into, adhering to, enforcing or claiming any rights under any contract, agreement, under-

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72. The original executed Westermann affidavit has been filed with the Clerk of the Court.

standing, plan or program, with any other person, company, patent pool, organization, association, corporation or entity which directly or indirectly restricts or prevents defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, from exporting any electronic apparatus from the United States into any foreign market" (A. 3080).

Zenith asserts that the Court of Appeals held that there can be no threat of damage unless "actual damage is proven" (Z. Br. 96), and that the court required "proof of actual injury as a condition to injunctive relief" (Z. Br. 101). This is a misstatement of the Court of Appeals' holding. Section 16 of the Clayton Act (15 U.S.C. § 26) permits injunctions only "against threatened loss or damage," and the Court of Appeals held that "injunctive relief against 'threatened loss or damage' directed at those pools, alleged by Zenith to be unlawful conspiracies, *cannot be justified* under 15 U.S.C. Sec. 26" (A. 4261-62). Any fair analysis of the court's opinion makes it clear that its decision on the injunction was based on the conclusion that no future loss or damage was threatened, not because actual damage had not been proven.

The fact is that Zenith has used its "injunction" argument primarily as a springboard for its inflammatory, prejudicial charges intended to distract from the truth. These charges include the insinuation of treason against Hazeltine Corporation previously referred to (pp. 77-79, *supra*), and a number of charges relating to supposed *current* conditions. For example, without any support Zenith erroneously asserts that the vacation of the injunction "leaves Zenith's foreign business exposed to ruinous infringement litigation and at the mercy of the Pool's enforcement policy," and "deprives Zenith of any protection for this business" (Z. Br. 100) and that the decision will destroy "the competition of all other electronic companies seeking

to export to the markets involved, and this at a time when this country desperately needs to preserve its foreign trade" (Z. Br. 100).

These charges were directly answered by the fact that in each country there has been no interference or threat of interference for many years:

*Australia:* There is no showing or finding of any interference at any time with Zenith's foreign trade with Australia, other than the hearsay statement of Wright that Zenith was thrown out of Australia "in either the late twenties or early thirties" (A. 475). Patent licenses permitting imports of radio and television sets into Australia have been available to Zenith since at least 1951 (DX 192, A. 2425), several years before the embargo blocking imports from dollar countries was lifted (see pp. 16-17, 65, *supra*). Others are importing freely into Australia subject only to economic conditions (see statistics on imports, p. 67, *supra*), but Zenith has never been sufficiently interested even to ask for a license (see pp. 63-64, 138-39, *supra*).

Yet Zenith asserts that "the pools" threaten "destruction of foreign markets in . . . Australia" (Z. Br. 101).

*England:* There is no showing that the English pool threatened or took any action against Zenith or its distributor who has been importing Zenith products since the lifting of the governmental embargo in 1959 which had been an absolute bar to Zenith imports (see pp. 16-17, 31, *supra*). Moreover, the policy of the English pool with respect to imports was changed a decade ago, and in any event the pool itself went out of existence June 30, 1964 (see pp. 44-46, *supra*). Nevertheless Zenith asserts that the vacation of the injunction "will destroy not only Zenith's competition to the Pools [including the English pool] but the competition of all other electronic companies seeking to export to the markets involved" (Z. Br. 100).

This assertion is particularly outrageous as to England in view of the fact that not only is the pool out of existence, but the Hazeltine Corporation patents are no longer even licensed to General Electric Company, Limited. Hazeltine Corporation itself has complete control of these patents, and *Zenith knows it*. Attached to the David Westermann affidavit (Appendix C, A-28 to A-30) is a copy of a letter of October 10, 1966, from Westermann, then Vice President and General Counsel of Hazeltine Corporation, to John Borst, Jr., a partner in the firm of McConnell, Freeman, Curtis & McConnell (now McConnell, Curtis, Mahon & Borst), Zenith's counsel here, expressly advising of that fact, and that "anyone interested in a license under any of these [British] patents should address his inquiry to Hazeltine Corporation in New York" (A-31). Hazeltine Corporation has never received a response to that letter—but the unfounded, inflammatory charges continue.

*Canada:* The record shows that following discussions between Zenith and CRPL in 1958 and 1959, and apparently in the light of Wright's strong assertion that Zenith was licensed under all relevant Canadian patents controlled by CRPL, Zenith has imported into Canada for almost 10 years, with absolutely no interference or threats of any kind by CRPL (see pp. 50-51, *supra*). Those final occurrences in 1958 and 1959 were at most like those referred to in *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 334-35 (1952), where this Court, in denying injunctive relief, stated: "There were hints . . . [of] reviving the expulsion threat . . . but nothing came of it."

As support for its argument that the injunction should not have been lifted, Zenith points to its 1967 exports to Canada, saying that these exports were possible because of the protection of the injunction (Z. Br. 100). Zenith's assumption that these sales were the result of the injunc-

tion and would be lost if the injunction were lifted, is fallacious for a number of reasons.

First, in over six years *prior* to the injunction, during which Zenith was openly importing and selling radio and television sets in Canada, the pool took no action against Zenith, or its distributors or dealers. Thus, it can hardly be assumed that the continued lack of interference by the pool with continued importation and sales by Zenith in the three and a half years since the issuance of the injunction, was the *result of* the injunction.

Second, Zenith's figures do not show that its share of either the Canadian black and white television market or the Canadian radio market has increased substantially from the 5% it obtained in 1961 (see pp. 120-21, *supra*). According to Zenith's own figures its increased exports to Canada in 1967 were almost entirely color television (*compare* Zenith's Petition for Certiorari, p. 10, *with* its brief, p. 100), which is essentially a new product in Canada. Broadcasting of color programs on Canadian stations did not start even on a limited basis until mid-year 1966 (see Appendix E to this brief, pp. A-37 to A-39), so the only previous color television business was limited to markets where the user could receive broadcasts from American stations. In its brief, Zenith has carefully avoided informing the Court as to how much of its $12,694,000 exports to Canada in 1967 were color television sets. It is clear, however, that Zenith's 1967 percentage share of either the Canadian black and white television market or the Canadian market for all television sets could not have been substantially higher than the 5% Zenith obtained in 1961, years before the injunction (see pp. 120-21, *supra*).

Finally, even if we assume that Zenith's share of the relevant Canadian markets has increased, there is no rea-

son to believe that the increase was a result of the injunction as opposed to an expected progression of increased sales resulting from the fact that by 1967 Zenith had been exporting to Canada for ten years. Since the Canadian pool was not shown to have done anything either before or after the injunction, any increase in Zenith's business in Canada in 1967 over what it had done in the years 1959-1963 can hardly be attributable to the injunction.

In any event, the reinstatement of the injunction could have no impact on the Canadian pool because, as shown in the Westermann affidavit (Appendix C), the Hazeltine Corporation patents *have not been licensed to the Canadian pool* since December 31, 1965, except for the right of CRPL to grant sublicenses to existing sublicensees until June 30, 1966. Since that time Hazeltine Corporation has been prepared to enter into agreements covering any one or more of its Canadian patents as the other party may see fit, and with no restrictions on imports. A number of such agreements have been entered into with United States, Canadian and Japanese television manufacturers, and such an agreement is available to Zenith on a non-discriminatory basis, should it desire one (Appendix C, A-29 to A-30).

## XI. ZENITH'S ARGUMENT ON THE "PATENT MISUSE DEFENSE" RAISES MOOT QUESTIONS AND IS ERRONEOUS.

Zenith argues at length what it calls the "Patent Misuse *Defense*" (Z. Br. 37-42, 102-13). Just what Zenith is defending *against* is not clear because the Court of Appeals, affirming the trial court, held that the single patent sued on was invalid; that there was evidence to support the finding that Hazeltine Research misused its patents in connection with its 1962 offers to Zenith on color patents; and awarded Zenith $150,000—treble the amount of its claimed

expenditures in defending the patent suit and investigating Hazeltine Research's U.S. patents (A. 4251, 4262-63). Since Hazeltine Research has not appealed from this judgment it is obvious that the misuse "defense" is moot. See *St. Pierre* v. *United States*, 319 U.S. 41, 42 (1943).

Although the Court of Appeals held the Hazeltine Research patent to be invalid and misused, the court did reject two of Zenith's misuse arguments and modified two paragraphs of the injunctive decree relating to license offers on Hazeltine Research's domestic patents (A. 4252, 4262). In this section we will show that the court was correct in rejecting these two misuse arguments and then deal with some of Zenith's more flagrant misstatements of the record, most of which are directed to matters not before this Court.

### A. The Offers in 1959 on Patents for Black and White Television Were Fair and Reasonable in Light of Commercial Realities.

The license proposal offered to Zenith in 1959 was formulated by Hazeltine Research when only three or perhaps four of its patents were in general use in black and white receivers (A. 775-76, 3076-77). Under this proposal, a license under all of Hazeltine Research's patents was available at a royalty rate of 0.95% of the selling price of receivers made and sold by the licensee with an annual maximum of $50,000; a license under one patent was offered for 50% of that rate and an annual maximum of $25,000; a license under two patents for 80% of that rate and an annual maximum of $40,000; and a license under three or more patents for 100% of that rate with the $50,000 annual maximum (A. 776).

Recognizing that the charge of "economic coercion" requires an examination of the facts, the Court of Appeals

reviewed the undisputed facts in the record, and concluded that:

> "The district court concluded erroneously that HRI's [Hazeltine Research's] 50% for one—80% for two—100% for three or more patents formula offered Zenith in 1959 was unlawful economic coercion. This court has not considered the formula *per se* unlawful. *Apex Electrical Mfg. Co.* v. *Altorfer Bros.*, 238 F.2d 867 (7th Cir. 1956). Actually the formula allowed licensees to save money by taking licenses of less than three patents. Eight TV manufacturers took licenses for only one patent under the formula, the one here in suit. There were only three HRI patents in general use in 1959 and therefore the formula appears reasonable in light of commercial realities. Zenith under the offer was free to take a license only for what it needed. Although discussion of a license between Zenith and HRI originally involved four patents, the discussion narrowed to the patent in suit, Zenith's rejection of the offer, and HRI's infringement suit" (A. 4252).

Zenith argues only that the Court of Appeals "failed to perceive the misuse inherent in the 50-80-100%" formula (Z. Br. 107) and ignores the factual basis for the court's decision. Zenith's argument is that the offer would coerce the prospective licensee to take the package of all patents, yet a number of other television manufacturers—including Magnavox, Westinghouse, Giannini Control Corporation, Curtis Mathes, Packard-Bell, Warwick, Wells-Gardner and Setchell Carlson—when offered this same proposal did *not* take a package license but instead took a license as concerns monochrome television under the *single* patent in suit at the 50% rate (A. 106-08, 3073-74). Many of these manufacturers were smaller than Zenith and obviously less able to withstand "economic coercion" than Zenith which asserts it is "the number one producer of television sets in the United States" (Z. Br. 77).

Having no explanation for the direct contradiction between its argument and these compelling facts, Zenith resorts to misstating the record. It asserts that Hazeltine Research in 1959 "demanded that Zenith sign a package license" (Z. Br. 38) but its own vice president Crotty testified that during these negotiations Hazeltine Research offered Zenith a license under the *single patent* sued on at the 50% rate with a $25,000 annual maximum (A. 438). This offer was rejected by Zenith, not because of so-called coercion, but on the ground it did not need any license (A. 436), for as stated in its brief, it contended that *"none"* of the patents discussed was "valid or infringed" (Z. Br. 38).

These facts, ignored by Zenith and the trial court, make it clear that the trial court's finding of "economic coercion" was clearly erroneous and that, as found by the Court of Appeals, the 50-80-100% formula was "reasonable in light of commercial realities" (A. 4252). Furthermore, these facts clearly distinguish this case from the *American Securit* case (Z. Br. 110-11) where the licensor "consistently refused to license individual patents" and only as a last resort offered individual patents but at the *same* rate as the package rate (154 F.Supp. at 894).

Zenith also claims that "as a result" (Z. Br. 107) of the Court of Appeals' conclusion that the 50-80-100% formula was not a misuse of patents, it improperly modified the injunction drafted by Zenith and entered by the trial court. It asserts that the modification permits "licensing of individual patents 'the sum of which is greater than the package rate'" (Z. Br. 102), but Zenith fails to point out that the court added the qualifying language "*so long as* the rates for individual patents are not so disproportionate to the

package rate as to amount to economic coercion to force the taking of the package" (A. 4262).[73]

**B. It Is Not a Misuse of Patents to Propose Royalties on Total Production.**

Hazeltine Research's license forms, including those offered to Zenith, provided that the royalty percentages be based on the licensee's total production of receivers of the type licensed (*e.g.*, DX 2, A. 955, 959; DX 18, A. 1044, 1047), and the trial court held this to be a misuse of patents (Finding XII, Conclusion VI, A. 2898, 2909-10). In reversing the trial court,[74] the Court of Appeals relied on *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827, 834 (1950) where this Court, in considering this same royalty provision, held that "it is not *per se* a misuse of patents to measure the consideration by a percentage of the licensee's sales."

In contending that the Court of Appeals erred, Zenith first asserts that the payment of royalties based on a percentage applied to the licensee's total production of "a class of goods," whether or not the licensed patents are used, is "a flagrant patent misuse under the established principle of the tie-in cases" (Z. Br. 112). However, this Court rejected this same argument in the *Automatic Radio* case stating:

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73. The court also made other modifications in the injunction because the decree as drafted by Zenith was vague and ambiguous and could be construed to require that Zenith be given an advantage over other licensees (A. 4262). Zenith has not challenged these changes.

74. Based on its reversal, the court modified paragraph A of the injunctive decree by deleting the words "or upon the paying of royalties on the manufacture, use or sale of apparatus not covered by such patent" (A. 4262). It did not, as Zenith asserts (Z. Br. 103), strike that paragraph entirely.

"The principle of those [Tie-in] cases cannot be contorted to circumscribe the instant situation. This royalty provision does not create another monopoly; it creates no restraint of competition beyond the legitimate grant of the patent. The right to a patent includes the right to market the use of the patent at a reasonable return" (339 U.S. at 832-33).[75]

Next, Zenith argues that this Court's holding in *Automatic Radio* is "distinguishable" and applies only to "arms length" transactions and that it is no sanction for Hazeltine Research's alleged "demand" that Zenith accept a license with such a royalty provision (Z. Br. 112-13). However, Zenith has cited no testimony or other evidence in the record that it ever objected to this royalty provision or requested a different method of measuring royalties. Its reference (Z. Br. 113) to DX 115 (A. 1035-36) certainly does not evidence any "demand." This letter transmitted a royalty schedule to Zenith in March of 1963 and invited Zenith to discuss the schedule with Hazeltine Research (A. 1035) and Zenith never replied (A. 629-31). The fact is that the record is totally void of any evidence that this royalty provision was even discussed by Zenith with Hazeltine Research. There have, therefore, been no "demands" but rather *offers* which were rejected by Zenith without discussion of the royalty provision. Thus, this is *not* a case where a licensor has insisted upon such a royalty provision

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75. See also Plastic Contact Lens Co. v. Butterfield, 366 F.2d 338, 342-43 (9th Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); Hazeltine Research, Inc. v. Avco Mfg. Corp., 227 F.2d 137, 146-49 (7th Cir. 1955), *cert. denied*, 350 U.S. 987 (1956); Hazeltine Research, Inc. v. Admiral Corp., 183 F.2d 953, 955-56 (7th Cir. 1950), *cert. denied*, 340 U.S. 896 (1950), all of which upheld this method of measuring royalties and relied on this Court's decision in *Automatic Radio*.

over the objection of the prospective licensee.[76]

If, as this Court held in *Automatic Radio*, licenses measuring royalties by total production may be entered into, someone, presumably the licensor, must have proposed such a license. To say that such a proposal is lawful if the licensee accepts it, and unlawful if the licensee simply refuses a license without objection to this provision, is absurd.

### C. Zenith's Other Charges of Coercion and Misuse Are Erroneous and Totally Irrelevant to Any Issue Before This Court.

Zenith argues at length (Z. Br. 38-40, 106-07) about the license proposals made by Hazeltine Research on color patents, an issue not before this Court. The issue at the trial with respect to these proposals was whether a $200,000 annual maximum in Hazeltine Research's proposals was available no matter which patent or groups of patents the licensee selected or whether, as Zenith contended, the maximum was available only if a licensee took a total package

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76. The extent to which Zenith will go in distorting the record in a vain attempt to show that Hazeltine Research had as its objective the collection of royalties on unpatented products is shown by its misleading quotation (Z. Br. 41-42, 112) from DX 38 (A. 1148-51). It quotes a part of that exhibit and through substitutions makes the quote read:

> ". . . it would not make any practical difference in Hazeltine's income if he switched to the alternate . . . design [*that doesn't use the licensed patents*]."

The truth is that the full statement was that,

> ". . . it would not make any practical difference in Hazeltine's income if he switched to the alternate single gun tube television set *design and used ten or so of the unspecified patents instead of the patents listed under A above*" (A. 1149).

In other words, if the licensee did not use one group of licensed patents he would be using another group of licensed patents.

license. It was the intent of Hazeltine Research that, as a matter of fairness, the $200,000 maximum, which was in its license to RCA, was to be made available to all licensees no matter which patent or patents they selected (A. 582-83); however, the trial court found in favor of Zenith and the Court of Appeals held there was substantial evidence to support this finding as concerns the proposal in 1962 (A. 4251). Accordingly, this issue is totally moot and is included in Zenith's brief solely in an attempt to prejudice Hazeltine Research on other issues.

Zenith has also devoted some of its "misuse" argument to an attempt to persuade this Court that there was some connection between the domestic patent license negotiations and the "foreign pools." For example, it wrongly asserts that the trial court "found" that Hazeltine Research "restrict[ed] its domestic licenses to the United States pursuant to the conspiracy" (Z. Br. 37) and that the Court of Appeals did not "appreciate the connection between Hazeltine's domestic licensing activities and its participation in foreign pools" (Z. Br. 107). Zenith offered no evidence at the trial to support these charges; it expressly abandoned the charges at the trial; and *both* courts below found there was no evidence to support them (see pp. 124-29, *supra*).

Finally, Zenith has filled its misuse Statement and Argument (Z. Br. 37-42; 102-113) with totally unsupported and unsupportable charges, in some cases without any record references whatever, and in other cases with record references that either do not support the statements made or support the contrary. It is unnecessary to burden the Court with an extensive answer to this barrage of irrelevant and unsupported misstatements, which would unreasonably extend this brief beyond its present considerable length. But in order that the Court may appreciate the extent and

nature of these misstatements, we will point out a few flagrant examples:

1. In connection with its persistent, reiterated contention that Hazeltine Research "would not license its patents except under a package license," Zenith cites and quotes (Z. Br. 103) from a Dodds memorandum written in 1961 (DX 3, A. 985-95). The fact is that this memorandum specifically contradicts Zenith's contention. It states:

> "It is believed that it would be hazardous for Hazeltine to refuse to negotiate in good faith on a license on any of its patents that a licensee may want and Hazeltine has consistently done so, *as evidenced by the many licenses now outstanding on single patents*" (A. 991-92).

Yet Zenith cites this document as authority for its claim that Hazeltine Research would grant only "a package license."

2. In connection with its contention that the 50-80-100% formula for black and white television patents was unlawful, Zenith quotes (Z. Br. 108-09) from notes by Ruestow in which, it says, Ruestow "conceded the misuse inherent" in the 50-80-100% formula. Zenith fails to state that these notes *did not have anything to do with* the application of the formula to the three or four *black and white patents*. Rather, Ruestow suggested that it might be a misuse of patents if this formula *were* offered in connection with the *10 color patents*. But it was *never offered* for color patents. Ruestow testified that the 50-80-100% proposal had been made *only* in connection with the monochrome patents (A. 636, 640-41) and wrote that the proposal was *not* available for color patents (DX 25, A. 1093).

3. Zenith quotes at length (Z. Br. 108-10) from other notes and memoranda of Ruestow, asserting that they constitute an "admission" of illegality and misuse. What Zenith fails to disclose is that these memoranda and notes were *criticisms* of the recommendations of

others concerning possible licensing proposals, and that Ruestow's recommendations were followed, and the proposals which he objected to were abandoned (A. 607-10; *e.g.*, *compare* Ruestow's 1961 proposal, A. 1085, *with* Schedule A to the April, 1962 proposal to Zenith, A. 1031).

The flagrant misstatements made by Zenith in connection with an argument directed toward a claimed "defense" to the patent suit demonstrate the lack of merit in Zenith's arguments and the extent to which it will go to distort the record in this case.

## CONCLUSION

For all the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

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Dated: September 19, 1968

# APPENDIX TO THE BRIEF FOR RESPONDENT HAZELTINE RESEARCH, INC.

APPENDIX TO THE BRIEF
FOR RESPONDENT
HAZELTINE RESEARCH, INC.

# APPENDIX A

## 1957

# TO THE SHAREHOLDERS

## OF ZENITH RADIO CORPORATION

The year ended December 31, 1957 was one of great significance in the progress of your Company, marked by three important milestones:

1. Your Company made outstanding progress in its pattern of solid growth and increasing importance within the radio and television industry. This was accomplished despite an unfavorable change during the year in basic national economic conditions and in the face of unusually competitive and depressed conditions within our own industry.

The Company's sales of civilian products during the year established an all-time record. Despite a reduction from the year before in the total number of TV receivers produced and sold by the industry during 1957, your Company enjoyed a substantial increase in TV receiver unit and dollar sales, thus accomplishing the highest percentage of the total industry TV business that it had ever achieved.

The exclusive and patented Space Command Remote TV Control developed in our own research department, together with the recognized high quality and performance of the Company's products were important factors in achieving this substantial increase.

2. On October 17, 1957, the Federal Communications Commission provided for a three-year trial period of commercial operations in Subscription television. The basic framework of this order represents a reasonable and well thought out approach which provides adequate safeguards for the continuance of the present type of "free" broadcasting, acknowledges the right of businessmen to launch new enterprises in the market place, and in effect assigns to the public the final decision as to whether Subscription TV is in the public interest by the simple process of buying or not buying the superior programs Subscription TV will offer.

3. In September, the Company arrived at a favorable out-of-court settlement of the previously reported litigation with Radio Corporation of America, General Electric Company and Western Electric Company. The litigation involved was commenced by Zenith in December 1946.

### EARNINGS AND FINANCIAL

Consolidated net income for the year was $3,165,577 (or $16.86 per share), an increase of 32% over the $6,178,717 (or $12.85 per share) earned for the year ended December 31, 1956. The profits reported for the year were the highest earned by your Company in any complete fiscal period.

(They were exceeded only by the $6,479,390 (or $17.22 per share) earned in the pro-forma, 12-month period ended December 31, 1950, which consisted of an estimated 4-month period from January 1, 1950 to April 30, 1950, plus the 8-month short fiscal period from May 1, 1950 to December 31, 1950.)

Consolidated sales for the year of $160,018,978 represented an increase of 12% over the $141,529,855 sales reported for 1956 and were the second highest in the Company's history, being exceeded only by the $166,783,276 sales for 1953, which included a substantial amount of government contract business.

Sales of consumer type products during the year established an all-time record. We have previously pointed out to our shareholders that our sales volume is composed almost entirely of radionic products such as radio and television receivers, phonographs and hearing aids. This should be borne in mind in any comparisons because many of our larger competitors include in their reported sales, refrigerators, washing machines, air-conditioners, records, ranges and other items not directly connected with the radionics and electronics industry.

In addition to the net income earned for the year, less the dividends paid thereon, a total of $10,613,565 has been added to earned surplus. Of this amount $9,761,963 represents the net after tax result of the settlement of the litigation previously referred to. This includes the settlement of $10,000,000 plus previously provided accruals for possible liability resulting from the suit, which are no longer deemed necessary. The balance of $851,613 represents the net after tax result of previously established accruals for renegotiation, federal taxes, etc., which are no longer required.

The accompanying consolidated balance sheet as of December 31, 1957 certified by our auditors reflects a further improvement in the strong financial position of your Company. Cash and government securities (after earmarking $12,000,000 of government securities for payment of federal income taxes) total $36,433,058, an increase of 10% over the total of $33,015,761 shown at December 31, 1956.

Accounts receivable of $14,518,070 (net of reserve) reflected a $2,294,286 increase over the $12,223,784 shown the year before. $1,000,000 of this increase represents the installment receivable this October 1, 1958 as a result of the litigation settlement and the balance is the result of the substantially increased December sales volume.

Total inventories of $12,126,754 were up $1,380,784 from the year before as a direct result of this Company's larger sales volume in December and January. Finished goods inventories of $3,490,251 increased $430,206 from the previous year, also directly attributable to the Company's increased volume.

Working capital increased by $7,076,714 to $45,187,819 as compared to $38,111,105 at December 31, 1956.

### SUBSIDIARIES

Winchester Corporation, the Company's subsidiary in Sioux City, Iowa, which manufactures small radios under contract for the parent company, dynamotors for government contracts, electric motors and power generators, reported lower sales and profits for the year.

The Rauland Corporation, our cathode ray tube manufacturing subsidiary, had a satisfactory increase in sales and earned a substantial profit during the year. Continued close control of overheads and high production efficiencies contributed to the satisfactory profit.

The Company's wholesale distributing subsidiaries in New York and Chicago reported increased sales and satisfactory profits in the light of extremely competitive conditions in those markets.

## DIVIDENDS

The Company paid dividends of 75c per share on March 29, June 28, September 27 and December 27, 1957. An extra dividend of $2.00 per share, also paid on December 27, brought the total paid for the year to $5.00 per share. In addition, a special dividend of $2.00 per share payable January 31, 1958 was declared out of 1957 earnings.

## PRODUCTS AND MERCHANDISING

The soundness and value of the basic policies which your Company has followed for the past 39 years were again strikingly proven during the past year.

Although industry production and shipments of television receivers were the lowest in 5 years, your Company produced and shipped to its distributors the greatest number of television receivers in its history. Of equal importance and significance is the fact that shipments of Zenith television receivers from distributors to dealers during 1957 were also at a record high—proof that the increase in factory sales represented current sales movement and not inventory accumulation in the hands of distributors.

The result of the Company's increase in television receiver volume in the face of the substantial industry reduction was the attainment of the highest percentage of total industry volume that the Company has ever achieved.

The ability of your Company to move counter to the industry trend was in a large measure the result of its policy of offering to the public exclusive advanced features and high quality, which make Zenith merchandise a better dollar value than competitors' merchandise selling at much lower prices.

Although television receivers offered for sale by the Company during the previous year had received high ratings in competitive tests conducted by an independent testing laboratory, your Company designed, tooled and placed into production early in 1957 a new horizontal 21-inch television chassis which gives improved performance, greater reliability and lower service and maintenance costs than the excellent vertical type chassis which it replaced. Later in the year, your Company placed into production another newly engineered horizontal TV chassis to replace the highly rated 14 and 17-inch vertical chassis.

In the design of these two new chassis, your Company's development and production engineers weighed the production cost benefits available through the use of printed circuits as opposed to the higher service costs and maintenance problems that have been reported on television receivers using extensive printed circuits. Their final decision was to insure the superior performance, greater reliability and lower servicing costs of the receivers by the continued usage of the more dependable hand soldered and wired type of chassis, even at a moderate cost disadvantage.

(Conversely, in carefully selected smaller and less complicated circuits, such as certain radio receivers, they have determined that printed circuits often present an advantage both to the manufacturer and the ultimate consumer.)

The new horizontal television chassis featured a new type of "Sunshine" picture tube (developed by The Rauland Corporation) which requires far less video drive than conventional picture tubes and permits the television circuits to be broad banded to get more "sparkle" in the form of more detail and information from the reproduced picture. The reduced overall length of this new tube permits a substantial reduction in cabinet depth without having to resort to the 110-degree picture tube used by many other manufacturers, with its attendant production problems.

The popular and exclusive Space Command television remote control introduced in the summer of 1956 became an even more important factor in the Company's business from the standpoint of attracting consumer attention to the complete Zenith line and also from the standpoint of generating a very substantial amount of business in the receivers featuring this development. The obvious advantages and convenience of this exclusive Zenith engineering achievement, which makes use of ultrasonic or "silent sound" to activate and control a television receiver from across the room, gained even wider public recognition during the past year.

The Wavemagnet Antenna, which has contributed to the fine performance of our radio receivers in the past, was perfected for television application and was added to several of the Company's portable TV receivers. It is an effective replacement for the present type "rabbit ear" antennae on television receivers in those locations where the use of an outdoor antenna is either impossible or impractical and has the distinct advantages of small size and inconspicuousness.

During the year, the Company augmented its wide range of television cabinets with a new highly styled Decorator Group, which added many new fine furniture styles to complement the interior of any room, Provincial, Traditional, or Modern.

Each category of the Company's TV receiver business, table models, consoles, and console combinations showed an increase over the previous year both in unit and dollar sales. 70% of the Company's TV receivers sold were in the 21-inch tube size category as compared to 60% for the industry as a whole. This fact, plus the substantial sales volume of Space Command receivers, plus the impetus of the Decorator Group of cabinets, permitted the Company in 1957 to increase its average unit TV sales price, which has historically been higher than the industry average.

The Company continued to make good progress in the production and sale of radio receivers during the year.

The year 1957 witnessed the introduction of the Royal 1000—the world's most magnificent radio—a portable standard and short wave Trans-Oceanic receiver with advanced transistor circuitry throughout—the smallest and lightest standard and band spread short wave portable radio ever produced. This fine receiver can tune in short wave broadcasts from all over the world, weather reports, ship-to-shore stations; and is powered by ordinary flashlight batteries obtainable the world over.

This outstanding new receiver has been most enthu-

tastically received by our dealers and by consumers and has been in short supply since its introduction. There is no question that this magnificent new all-transistor portable will further enhance the enviable reputation your Company has earned in the past with its world-renowned short and standard wave *tube type* Trans-Oceanic portable, which has continued to enjoy a steady sale and will be continued in production.

In December, the Company introduced the Royal 500D, an improved version of its outstanding Royal 500 all-transistor pocket portable which, although priced higher than its competition, because of its superior quality and performance, was probably the best selling transistor portable in 1957. The new improved version is the first commercially produced entertainment type of transistor pocket receiver to have a radio frequency amplification stage, which further increased its sensitivity many times over.

Several new lower priced transistor models were also introduced in December which will make it possible for the Company's dealers to offer a complete line of high performing transistor sets in 1958.

In the AM/FM receiver category, a newly designed line of receivers introduced during the year was well received. Your Company continues to be the dominant factor in the AM/FM receiver field.

The category of record players, high fidelity phonographs, and phonograph combinations became increasingly important during the past year both as a result of increased public interest and the Company's aggressive merchandising and advertising efforts in this field. Many new high output multispeaker models were added to the line, several featuring the beautiful Decorator Group cabinets.

The Company's very substantial sales increase in this category cannot fairly and intelligently be translated into percentages because of the low base of comparison in previous years. Your Company feels that its reputation for quality earned during the past 39 years gives it an important advantage in the high fidelity field and it is planning to make this an even more important segment of its business.

A most important factor in the increased sales volume and greater stature within the industry which your Company enjoyed during the past year has been its aggressive and well-planned merchandising and advertising activities.

In designing and selecting its merchandise, much thought and planning was given to merchandising features and intelligent price-value comparisons and step-ups.

Complete merchandising programs were made available to our distributors, taking into full consideration operating expenses and profit margins. Included in these merchandising programs were step-by-step outlines for sales activities for different classes of dealers, pointing out the potential for the sale of Zenith merchandise and the advantages and profits to be derived therefrom.

These merchandising programs were supported by aggressive point of sale and newspaper advertising campaigns and further augmented by well-placed national magazine advertisements and a national television program in the latter part of the year.

Another important ingredient in our merchandising activities was the continued close control of production and of merchandise inventories at every level, factory, distributor and dealer. This contributed substantially to alleviating one of the major elements of risk, namely, the deterioration of inventory values which dealers had experienced on other lines of merchandise.

A great deal of favorable comment has been received by the Company from distributors and dealers, who welcomed our understanding and appreciation of these problems, and our stable businesslike solutions.

## HEARING AID

1957 was a year of continued growth for the Company's Hearing Aid Division. Sales showed an increase over the previous year and Zenith quality hearing aids continued in a position of leadership in the industry.

The new Zenith eyeglass hearing aid introduced in August helped immeasurably in breaking the vanity barrier that has stopped many people from enjoying the benefits of a hearing aid. Experience with the new eyeglass hearing aid and the Diplomat, which is worn behind the ear, plus supplemental marketing information, strongly indicate that inconspicuous, at-the-ear hearing aid models will become more important in the Zenith line of hearing aids.

The other seven models in Zenith's complete line of quality hearing aids maintained a strong sales volume. The completeness of the Zenith line permits Zenith dealers to offer the proper instrument for every electronically correctable hearing loss. The new Model "50R" introduced during the year and priced at $50.00, despite increasing costs, makes top performing hearing aids available for people of all incomes.

Your Company's Hearing Aid Division strengthened its personnel and engineering facilities in order to bring the newest advancements in hearing aids to the hard-of-hearing. A new laboratory for research was substantially completed in the summer of 1957. Here, hard-of-hearing people can be tested accurately to determine the degree of help they receive from existing hearing aids—and even more important—the degree of improvement which might be provided by hearing aids not yet fully designed. The engineering completion of such non-existent instruments is, of course, stimulated by these findings.

In the latter part of 1957 arrangements were completed with Bausch and Lomb Optical Company to handle the marketing of Zenith hearing aids in 90 foreign countries. Bausch and Lomb have established distribution channels in these countries, and it is anticipated that Zenith hearing aids will be the unquestioned leader the world over in a very short time.

## EXPORT

Although U. S. industry exports of TV and Radio receivers were down 9%, your Company's export sales volume in 1957 increased 33% compared with 1956. Contributing to the substantial gain were our exports of television receivers, which in 1957 were 68% ahead of the preceding year. Exports of radio receivers to Zenith distributors were up 24%, but sales to overseas post exchanges of U. S. Army, Air Force, and Navy decreased 19% compared with the previous year.

Adverse trading factors such as scarce and expensive dollar convertibility, increasing tempo of import controls, nationalistic protection of local industries, political unrest and upheavals, tended to depress export business generally during the year. Foreign competition reached its highest level of penetration in export markets in 1957

and accounted for a large portion of the world's exports of radio receivers and radio-phonograph combinations.

Your Company's outlook for export business in 1958 is good, based on the rising acceptance abroad of our excellent performing television receivers and the increasing activities of licensed local assemblers of Zenith products in Latin America.

In addition, your Company is inaugurating an aggressive program to set up distribution of radio and television receivers in Canada, where it had previously been excluded from participation in the market through the operation of a cartel. Experienced and capable personnel have been employed and arrangements are being made for larger facilities in Toronto and Montreal. The operation in these areas will be conducted as a division of your Company's subsidiary, Zenith Radio Corporation of Canada, Ltd., which is presently distributing hearing aids throughout the Dominion. It is anticipated that independent distributors will be appointed to handle the distribution of Zenith products in the other areas of Canada.

## PHONEVISION

The order of the Federal Communications Commission on October 17, 1957 providing for a three-year trial period of commercial operation of Subscription television was an important milestone in the development of Phonevision, the name applied to the Company's several pay-as-you-see television systems. The order provides that any TV station operating in a market served by four or more TV stations may apply to the FCC to serve its community with Subscription television programs. The order further provided that each acceptable Subscription television system would be limited to operation in three markets during the three-year trial period and provided adequate safeguards to insure that Subscription television would be as promised by its proponents, a supplemental service to "free" television service presently available.

Subsequent to this order, and unquestionably as a result of a high pressure campaign initiated by the networks who fear the competition of Subscription television, the House and the Senate Interstate Commerce Committees adopted resolutions requesting the Federal Communications Commission to delay the approval of any specific authorizations for Subscription television operation until Congress had had an opportunity to consider the subject further. These resolutions are strictly informal declarations of these committees. They do not have the effect of law because neither house has acted on this question.

The FCC has indicated that if Congress has not made its position clear by the end of this session, the FCC will proceed to process applications from stations 30 days after Congress adjourns.

During 1957 research and engineering on Phonevision went forward with particular emphasis on production engineering of both decoders and encoding equipment. This has resulted in performance improvements, cost reductions, and increased reliability.

In addition, several models of manufacturing process control and inspection equipment have been developed and tested because the production of decoders, each different from any other, although made from mass production parts, requires the application of special highly automatic methods of manufacture and inspection. The use of transistors and the development of novel transistor circuits especially applicable to the decoder has received much attention.

## NEW FACILITIES

On January 1, 1958 a new display salon was opened in the 666 Fifth Avenue building in New York City. This salon, located on the corner of Fifth Avenue and 53rd Street, is a street level showcase of the Company's products. Although all Zenith products will be on display in this salon, no sales will be made except for hearing aids.

The Company has for years operated a display salon at 333 North Michigan Avenue in Chicago, and (primarily for wholesale purposes) a display salon in the Merchandise Mart also in Chicago.

Because of the Company's favorable experience with its two display salons in Chicago, it had anticipated similar favorable results from the New York salon, except on a much broader national and international basis. The actual results to date have exceeded its highest expectations. Comments received from Zenith distributors and dealers throughout the United States and in many foreign countries are adequate proof that the salon is operating in accordance with our plan as an extension of our distributors' and dealers' showrooms.

The general offices of Zenith Radio Corporation of New York, radio, television and hearing aid distributing operation, were moved from 445 Park Avenue to the second floor of the 666 Fifth Avenue location.

The additional plant which The Rauland Corporation, the Company's subsidiary, purchased in July 1956 was made available for its use during 1957. Construction is in progress on a small addition which will have the effect of connecting this new plant to the adjacent presently existing plant. When this construction and alterations are completed, increased efficiency will be obtained by consolidating some of the Company's operations that are now at other locations and adequate facilities will be available for the possible manufacture of color tubes in the future.

## LITIGATION

The long pending litigation between Zenith Radio Corporation and its subsidiary, The Rauland Corporation, on one side, and Radio Corporation of America, General Electric Company and Western Electric Company on the other side, was terminated by an out-of-court settlement resulting in dismissal with prejudice on September 27, 1957 of all claims by either side against the other side in the Federal District Courts in Chicago, Illinois and Wilmington, Delaware.

The general basis of the settlement was a royalty-free exchange of domestic and foreign licenses under existing patents for radio and TV receiving sets, including tubes therefor (excluding color TV, color tubes and Phonevision), for a term beginning at that date and extending to January 1, 1963.

The agreement also provided for payments to Zenith and Rauland of the sum of $10,000,000 in equal yearly installments of $1,000,000 payable on the first day of October of each year. (The first payment was received on October 1, 1957.)

The agreement also provided for arbitration of the amount owing to RCA for alleged infringement of certain RCA patents and for arbitration of the amount

which RCA owes Zenith and Rauland for alleged infringement of Zenith and Rauland patents. The maximum and minimum amounts of these liabilities are specifically provided for in the settlement. Adequate provision has been established on Zenith's and Rauland's books to cover any possible liabilities under this arbitration.

The exchange of licenses, including foreign patents, will make it possible for the Company to reenter certain foreign markets, from which it had previously been excluded.

On January 10, 1958, the Company brought suit in the United States District Court of Illinois against Marshall-Wells Company of Duluth, Minnesota, alleging acts of unfair competition on their part in respect to the trademark "Zenith" and charging a conspiracy to commit acts of unfair competition against Zenith.

On February 11, 1958, the Company filed suit in the United States District Court of Illinois against Admiral Corporation of Chicago, charging it with infringement of five Zenith patents and with having wilfully and knowingly copied two of Zenith's most important TV features. The features copied were Zenith's Fringelock circuit, for maintaining a set picture in areas of poor reception, and its Space Command remote control device which uses ultrasonic "silent sound" to control a TV set from across the room.

The Company is also involved in certain other actions arising out of matters incident to the ordinary conduct of its business and adequate provision has been made for any possible liability resulting therefrom. In the opinion of management and counsel the outcome of the foregoing litigations should be favorable to the Company.

## EMPLOYEE RELATIONS

The Company during the past year continued to enjoy an excellent relationship with its employees and the unions representing its hourly paid employees.

The Zenith Profit-Sharing Retirement Plan, now in its ninth year, continues to show great value as an incentive for efficient operations and for attracting desirable employees and cementing employee relationship with the Company.

During the past year the Zenith Pioneers—employees with more than 20 years of service—grew from 300 active members to 479—from a total of 7,000 years of active service with the Company to more than 12,000 years.

## OUTLOOK

There exists presently a wide variation of opinion concerning the extent and duration of the unfavorable trend in basic economic conditions which began last year. By far the great majority of businessmen and economists feel that conditions will change for the better before the end of 1958.

In our own industry, some of the excesses and bad practices of the past have been alleviated, but the industry remains extremely competitive.

Production and shipments of your Company's products in the first two months of 1958 were substantially ahead of the same period the year before.

Your management foresees a continuing substantial volume of television receiver sales based on the normal replacement and obsolescence of the more than forty-five million TV receivers presently in use, plus the additional business available in the form of second and third sets in a household.

The radio receiver category which showed renewed strength during 1957 should show even greater growth in 1958 because of the stimulating effect of the application of transistor usage in portable sets and larger higher frequency radio receivers. The original advantages of the transistor's small size, low power consumption and long life have now been augmented by specialized transistor circuits and applications, and new transistor devices.

The importance of the application of transistors to our present type of products may be observed by reference to the radio and hearing aid pages in the Product Section of this report.

The continued growth of the market for high fidelity phonographs and combination receivers represents a great opportunity for your Company because in this category the customer places the greatest importance on high quality and outstanding performance, which gives Zenith an important advantage in this field.

Substantial progress has been made in our research and development work in the simplification of circuitry, picture brightness and other technical improvements in color TV receivers. Your management is continuing to carefully evaluate the public's reaction to the modest number of color receivers sold to date and our shareholders may be assured that Zenith will have reliable color television receivers in production when the time is appropriate.

Your Company is continuing its heavy emphasis on engineering and research because from these processes are born the outstanding exclusive developments and the built-in quality, performance and value that have enabled Zenith to maintain its growth. From this source also can come products leading to a desirable diversification of your Company's activities.

Your management is deeply appreciative of the loyalty, cooperation and conscientious effort of the Company's employees, shareholders, directors and officers who contributed so much to our successful operation during the past years.

We are particularly grateful for the aggressive efforts, splendid cooperation and loyalty of the Company's outstanding distributors and dealers.

This report is made for the information of shareholders in accordance with the established custom of the management and is not a representation, prospectus or circular with respect to the shares of the corporation.

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At a special shareholders' meeting held February 27, 1958 the shareholders approved the Company's plan to change the legal situs of the corporation from Illinois to Delaware, and effect certain other changes as outlined in the proxy statement dated January 31, 1958, sent to all shareholders.

Respectfully submitted,

E. F. McDonald Jr.

*President*

March 7, 1958

# 1958

# TO THE STOCKHOLDERS

## OF ZENITH RADIO CORPORATION

Zenith's 40th year of operations was marked by a continuation and acceleration of its steady growth and progress despite the fact that during a large portion of the year the basic national economy was in a recession period and production and shipments of television receivers suffered a greater reduction than the general economy.

Your management is pleased to summarize herewith the highlights of our progress. During the year ended December 31, 1958 your Company:

1. Established a new record in earnings.
2. Established a new record in production and sales.
3. Established a new record in production and shipments of television receivers—15% more than its previous record established in 1957—although industry production and shipments of television receivers for the year were the lowest in 9 years—down 20% from 1957.
4. Obtained the highest share of total industry TV volume in its history—a 46% greater share than 1957 and it is believed attained the number one position in production and sale of monochrome television receivers.
5. Increased its share of the total industry radio receiver business almost 25% over 1957.
6. Increased its unit production and sale of transistor type radios 145% over 1957 and increased its share of industry sales of this type of receiver 44%.
7. Increased sales in the overall category of stereophonic high fidelity and phonographs 43% over 1957.
8. Increased Hearing Aid sales and earnings.
9. Introduced several new products and developments which may have a significant future potential.

### EARNINGS AND FINANCIAL

Consolidated net income for the year was $12,116,165, or $12.30 per share—the highest earnings by your Company in any fiscal period—an increase of 48% over the $8,165,577, or $8.29 per share, earned the previous year.

Consolidated sales for the year of $195,041,624, also a new record, represented an increase of 22% over consolidated sales of $160,018,978 reported for the previous year.

Earnings in 1958 were favorably affected by an expanded volume of sales and a continuing close supervision of overheads and costs.

The accompanying consolidated balance sheet as of December 31, 1958, certified by our auditors, reflects a continuing improvement in the strong financial position of your Company.

Cash and government securities (after earmarking $10,700,000 of government securities for payment of federal income taxes) totaled $47,178,485, an increase of 23% over the total of $38,482,068 shown at December 31, 1957.

Accounts receivable of $17,425,087 (net of reserves) were up 20% from the $14,513,070 reported at December 31, 1957 reflecting the substantially increased sales volume in the last quarter and the deferred payment terms which the Company extended to its distributors at its successful December showing of its new Spring line. Included in the total for both periods is $1,000,000 representing the installment of the litigation settlement due October 1, of the ensuing year.

Total inventories of $16,240,605 represented a 34% increase over the $12,126,754 reported at December 31, 1957 and were a direct result of the Company's higher sales volume in the last quarter of 1958 and larger production schedules for the first quarter of 1959.

Finished goods inventories included in the above totals, which included inventories on hand and en route to our wholesale distributing subsidiaries, were also increased as a result of a higher pace of sales activity.

Working capital increased by $7,806,666 from $45,187,819 at December 31, 1957 to $52,994,485 at December 31, 1958.

### SUBSIDIARIES

The Rauland Corporation, our subsidiary engaged principally in the manufacture of cathode ray tubes, reported a substantial increase in profits and sales primarily as a result of Zenith's increased requirements of cathode ray tubes, high production efficiencies and continuing close control of overheads and costs.

Wincharger Corporation, the Company's subsidiary in Sioux City, Iowa, which manufactures small radio receivers under contract for the parent company, dynamotors for government contracts, electric motors and power generators, reported slightly higher sales and satisfactory profits for the year.

The Company's wholesale distributing subsidiaries in New York and Chicago reported increased profits, primarily as a result of very substantially increased sales.

Zenith Radio Corporation of Canada, previously engaged exclusively in the distribution of hearing aids in Canada, during the year initiated the distribution of radio and television receivers in the provinces of Ontario and Quebec. As a result, sales volume increased substantially, but the expense of moving the operation from Windsor to Toronto (with a new branch operation in Montreal) and the heavy starting costs in connection with the new distribution activities unfavorably affected earnings.

### DIVIDENDS

On January 31, 1958, the Company paid dividends of $2.00 per share (declared out of 1957 earnings) on the then outstanding 492,464 shares of no par value common stock and on March 31, 1958, $1.00 per share was paid on this stock. (This is equivalent to $1.00 and 50¢ per share respectively on the 984,928 shares of $1.00 par value stock presently outstanding.) The Company also paid dividends of 50¢ per share on June 30, 1958, September 29, 1958 and December 29, 1958. An extra dividend of $2.00 per share, also paid on December 29, 1958, brought the total *paid* for the year to $5.00 per share on the present outstanding 984,928 shares. A special dividend of $2.00 per share payable January 30, 1959, declared out of 1958 earnings, made a total of $6.00 dividends *declared* during the year.

## PRODUCTS AND MERCHANDISING

The basic policies which your Company has followed for the past 40 years continued to show their soundness and value in the past year, which was a difficult one for the general economy as well as our own industry.

In the two years of 1957 and 1958, industry production and shipments of TV were lower than the comparable quarter the year before in seven out of the eight quarters. Contrary to this industry trend, Zenith's production and shipments of television receivers during each quarter of the past two years were substantially higher than the comparable quarter the year before.

Your Company's ability to move counter to the industry trend and to continue its pattern of growth can be attributed to these sound basic policies developed and followed for the past 40 years:

1. Devotion to high quality in production and in performance (with resulting low service costs).
2. Specialization in designing and inventing outstanding advances and demonstrable technical features that the customer recognizes and wants.
3. Painstaking efforts in anticipating consumer preferences and tastes.
4. Emphasis on dollar value rather than price alone.
5. Application of sound business principles to aggressive merchandising and advertising programs designed to make Zenith products the best and soundest value at all levels of distribution, including the ultimate consumer.

The complete new line of television receivers introduced at a national showing early in June incorporated styling refinements in harmony with modern trends in household furnishings, and also new circuitry and features giving improved performance.

As in all Zenith products, your Company's television receivers are designed with a continuing emphasis on quality and reliability. All television receivers are made with the dependable horizontal hand-soldered and wired type of chassis, which has been so well received by dealers, customers and by service men who are pleased with the accessibility of parts and the ability to service the chassis at a very reasonable cost to the consumer.

The Zenith-Rauland developed Sunshine Picture Tube, which requires far less video drive than conventional picture tubes and permits television circuits to be broadbanded to get more "sparkle" in the form of more detail and information, was used in all receivers.

The popular and exclusive Space Command Television Remote Control (on which your Company holds basic patents), introduced in the summer of 1956, became even more important in the Company's business. The increase in sales over the year before of television receivers incorporating Space Command accounted for more than 40% of the total increase in dollar sales of Zenith TV receivers last year.

The obvious advantage and convenience of this exclusive Zenith engineering achievement, which makes use of ultrasonic or "silent sound" to activate and control a television receiver from across the room, prompted several competitors to market their own remote control devices, some of which infringed, in the opinion of our counsel, Zenith's patents.

Significant improvements were made in the new line of Space Command receivers. A new microphone with markedly improved sensitivity and frequency response was used, and a volume control was added to previously available features, which also permit the user to turn the set on or off, change stations, or mute the sound while the picture remains on the screen. A "touch bar" tuning mechanism introduced on Space Command models permits the changing of channels when the user is standing at the television set merely by touching the tuning bar.

The Zenith Space Command Remote Control, in competitive tests conducted by an independent testing laboratory, received the highest rating for overall quality and has been judged "the most convenient remote control system."

Your Company's 14-inch and [illegible]-inch receivers, which had previously received high ratings, were further improved by the addition of a full powered transformer and tube rectifier circuit.

The Company's 21-inch receivers again received the highest ratings from an independent testing laboratory for overall quality in strong and medium signal areas.

Both categories of the Company's TV receiver business, table models and consoles, showed an increase over the previous year. The increase was particularly significant in consoles, which increased almost 48% in units over the previous year. In the overall 21-inch category, including consoles and table models, your Company's increase was 22%.

In radio receiver production and sales, your Company reported an increase of 18% over 1957 as compared to a decrease in the industry of 9%. Zenith's percentage of the industry increased almost 25%.

During the year, significant changes occurred in the industry overall category mix. Regular tubed type AC-DC receivers, clock radios, portable receivers and phonographs suffered substantial reductions, although your Company had an increase in the production and sale of tubed AC-DC receivers, clock radios and phonographs over the year before, attributable in a large measure to the introduction of attractive newly designed merchandise.

There were substantial industry increases in the sales of AM/FM receivers and in transistor type portable radio receivers. The industry increase in transistor type portable radio receivers was very significant, almost 70%. However, your Company's 145% increase was more than double the average of the industry.

The Company's line of transistor radios was considerably expanded during the year through the introduction of new models which permitted Zenith dealers to offer attractive merchandise in price classes ranging from a suggested list price of $44.95 for a powerful 7-transistor pocket type portable radio to a suggested list price of $275.00 for the Model Royal 1000D, an all-transistor standard and short wave Trans-Oceanic receiver with added long-wave bands, making it useful for navigation as well as entertainment and other purposes.

It seems quite probable that Zenith, in its radio and hearing aid usage, continues as the largest user of transistors in devices sold to the public.

The category of record players, high fidelity phonographs and stereophonic high fidelity phonographs and combinations became increasingly important during 1958 both as a result of increased public interest and the Company's aggressive merchandising and advertising efforts in this field. In this total category, the Company achieved an increase in sales volume of 43% over the year before.

The Company's high fidelity phonographs were completely re-engineered during the year for the finest performance and a complete line of stereophonic record playing instruments was introduced, many of which are capable of giving 40 watts of undistorted power output and up to 80 watts maximum.

The Company pioneered a "self-contained stereophonic" unit in addition to the "stereo-equipped" models with

which a separate remote speaker is used. The combination of high quality high fidelity reproduction and stereophonic directional effect gives a new dimension of sound reproduction which had not been previously available to the public in home phonographs.

Well-planned merchandising and advertising activities were a most important factor contributing to the increased sales volume and greater stature within the industry which your Company enjoyed during the past year.

Much thought and planning went into the designing, engineering and selection of merchandise to provide attractive merchandising features and intelligent price-value comparisons and step-ups.

Aggressive merchandising programs were made available to our distributors to provide substantial incentives for Zenith dealers to increase their purchases and displays of Zenith merchandise. These programs proved to be an outstanding success at both the distributing and dealer levels. Effective point of sale and newspaper campaigns were used to support these merchandising programs, and well-planned national magazine advertisements and a national television program in the latter part of the year, all featuring quality and value, completed and integrated the entire program.

Continued close control of production and merchandise inventories at every level, factory, distributor and dealer, was recognized as alleviating one of the major elements of risk in this industry, namely, the deterioration of inventory values which occurs when manufacturers, distributors or dealers become overstocked and are faced with inventory liquidation.

## HEARING AID

Hearing aid sales during 1958 again showed an increase over the previous year as Zenith improved its position in providing quality hearing aids for the hard-of-hearing throughout the world.

During the year, eight new hearing aid instruments were introduced to give even more benefits to those suffering a hearing loss. Probably the most dramatic instrument was the new Citation eyeglass hearing aid with advanced fitting features providing greater comfort and a more natural fit for the user. Zenith also incorporated the bone conduction hearing principle into its Imperial eyeglass hearing aid. In this instrument, the sound is transmitted to the nerve through the mastoid bone and eliminates the necessity for wearing anything in the ear canal.

While its present line of eleven all-transistor hearing aids features eight instruments that were new or redesigned during the year, increased merchandising effort and dealer support have also played an important part in keeping Zenith hearing aids moving ahead in the industry. During the year many new full-time hearing aid dealers were franchised and many existing dealers continued the trend of improving their facilities. Our hearing aid marketing program was further improved by an extensive consumer survey to determine the differences in attitudes between first-time users and repeat users of hearing aids. The results of this survey were the foundation for a successful Fall merchandising campaign to tell the public about Zenith "Living Sound" Quality Hearing Aids.

The momentum generated during 1958 should make its full significance evident during 1959 with even greater increases in hearing aid sales and profits.

## EXPORT

The Company's 1958 export sales of television and radio receivers, phonographs, high fidelity and stereophonic instruments, and parts reached the highest level in Zenith's history, reflecting a substantial increase of 13% over 1957. The record was particularly notable because 1958 was generally a poor year for exports. Significant gains were achieved in all product categories exported during the year to Zenith's foreign distributors and assemblers.

During 1958, such important markets as Mexico, Colombia, Venezuela and Cuba went through political changes or upheavals that generally depressed our exports to those countries. Much more severe controls were imposed on dollar convertibility in many countries, principally Argentina, Brazil, Uruguay, Philippines, South Africa and the Middle East countries, which tended to restrict importation or make the cost of imports prohibitively expensive. In addition to the traditionally strong European protectionist block, other countries, including Argentina, Brazil, Chile, Mexico, South Africa and the Philippines, which in the past were good export markets for Zenith, were subjected to sweeping import restrictions designed to protect local industry. Increased activities of foreign competitors enabled them to penetrate markets which had heretofore favored U.S. products by a wide margin. The heavy inroads into foreign (and domestic) markets made by Japanese all-transistor radios were particularly disturbing because they were being offered at very low prices, based on the extremely low labor rate paid to workers. Other foreign manufacturers also offered reduced prices and extended payment terms over long unsound periods of time.

The year 1959 looms as a difficult one for the export business, with a continuation, and possibly an increase, in the unfavorable trading and competitive situations. However, continuing improvement in the performance and merchandising values of Zenith products, the growing strength of Zenith export distributors and assemblers, together with the Company's increased marketing efforts abroad, may offset the unfavorable factors and make it possible to have another fine export year in 1959.

The substantial increase in sales noted above accomplished in a difficult export market does not include a significant volume of purchases of television and radio receivers and phonograph units by Canadian distributors during 1958. During the year, an aggressive sales and operating organization was added to the personnel of the Company's subsidiary, Zenith Radio Corporation of Canada, to initiate the distribution of radio and television receivers to dealers in the provinces of Ontario and Quebec. Four outstanding and experienced independent distributors were appointed to handle the distribution of Zenith products in western Canada. Although there has long been a strong consumer demand for Zenith products in Canada, much work had to be done to establish a dealer organization and the major benefits of Canadian distribution will begin to be felt in 1959.

## PHONEVISION

In our last annual report you were advised that on October 17, 1957 the Federal Communications Commission had authorized a three-year trial period of commercial operations of subscription television, an important milestone in the development of Phonevision, the trade name used to designate the Company's systems of subscription television.

Following this authorization a campaign of unprecedented vigor was conducted by various opponents of subscription television for the purpose of securing some legislative restriction or prohibition against carrying out the

Commission's order. These pressures resulted in delaying the effectiveness of the Commission's order.

In the meantime, a countervailing force has become increasingly evident in the wider public realization that current television programming is not adequate to satisfy the public demand and that only through some means whereby the public can share directly in their cost can substantially better programs be shown on television.

At this writing there has been no modification of the Federal Communications Commission's previous announcement that no applications for authorization to engage in subscription broadcasting will be processed until after the current session of Congress has adjourned. However, a number of officials who have heretofore expressed themselves as unalterably opposed even to any trial of subscription television, have now modified their views to the extent that they feel that a fair and adequate trial of the service should be permitted. There are also some signs that the television networks may have modified their position on this subject.

For these reasons we are optimistic that in time this political log-jam will be broken and it will be possible to conduct initial operation of the service in some markets in the United States.

During the year your Company made further progress in refining and simplifying decoder designs. A number of components used in the decoder were re-engineered for improved performance, improved reliability, and a further increase in security of the system.

Many aspects of the operational procedures associated with a subscription service were also under continuous study during the year. These investigations have resulted in detailed planning and engineering of a number of business machines needed for this unique application.

## FACILITIES

Production requirements of the Company's expanded radio, stereophonic phonograph and television receiver business indicate the need for additional facilities in order to provide an adequate supply of merchandise on an efficient low cost basis during the peak season of the year. This problem has been under study by your management for many years and reports have been made from time to time to your Board of Directors. At a Directors' Meeting held on November 25, 1958 the officers and management of Zenith Radio Corporation were authorized to undertake a capital expansion program for the parent company and its subsidiaries during the year 1959 in the amount of $7,500,000.

Because many of the plans and projections in connection with this expansion have not been completed, it is unlikely that this entire amount will be spent in 1959.

In February 1959, as the first phase of this expansion program, the Company purchased a plant at 6501 W. Grand Avenue, Chicago, containing approximately 110,000 square feet of factory and office space, plus approximately 40,000 feet for parking. It is planned to immediately transfer certain activities to this new location.

The public display salon at 666 Fifth Avenue, New York City, has produced favorable results far beyond any previous expectations of the management. The impact of this display salon has gone far beyond its local effect in New York City and has proven to have a beneficial effect on a national and international scale.

Your management feels that the same favorable results can be obtained by an improved and larger showroom in Chicago and accordingly the Company has taken a long-term lease on the property at 200 North Michigan Avenue, a very heavily traveled location both for automobile and foot traffic. It is expected that this display salon will be completely remodeled and opened to the public by May 1, 1959.

## LITIGATION

The Company's lawsuit against Marshall-Wells Company of Duluth, Minnesota, for unfair competition in respect of its merchandising of kitchen and laundry appliances under the trademark ZENITH, which began on January 10, 1958, is in the early stages of pre-trial discovery. During the year, Marshall-Wells Company joined issue with Zenith's complaint and filed an unfair competition counterclaim. Pre-trial motions brought by both parties are awaiting decision by the Court. Preparation for the taking of discovery depositions is currently under way.

With respect to the litigation commenced on February 11, 1958 charging Admiral Corporation with patent infringement and with having wilfully and knowingly copied Zenith's Fringelock circuit and its Space Command remote control system, two additional Zenith patents which issued in 1958 on further features of the Space Command system have been added to the litigation, making a total of seven Zenith patents involved. Admiral has counterclaimed for infringement of two of its patents on record changer devices. Pre-trial discovery depositions are expected to commence in March, 1959.

Preliminary steps have been taken with respect to the arbitration provided for under the agreement which terminated the litigation between Zenith Radio Corporation and its subsidiary, The Rauland Corporation, on one side, and Radio Corporation of America, General Electric Company and Western Electric Company on the other side, with the selection of the arbitrator, the Honorable Judge John P. Barnes, retired, formerly Chief Judge of the U.S. District Court for the Northern District of Illinois.

This arbitration is to determine the amount owing to RCA for alleged infringement of certain RCA patents and the amount which RCA owes Zenith and Rauland for alleged infringement of Zenith and Rauland patents. The maximum and minimum amounts of these liabilities have been specifically provided in the settlement agreement. Adequate provision has been established on Zenith and Rauland books to cover any possible liabilities under this arbitration.

The Company is also involved in certain other actions arising out of matters incident to the ordinary conduct of its business and adequate provision has been made for any possible liability resulting therefrom. In the opinion of management and counsel the outcome of the foregoing litigations should be favorable to the Company.

## EMPLOYEE RELATIONS

During the year the Company continued to enjoy an excellent relationship with its employees and the unions representing its hourly paid employees.

The Zenith Pioneers, employees and retired employees with more than 20 years of service, continued to grow and now number 504.

The Zenith Profit-Sharing Retirement Plan, now in its tenth year, continues to show great value as an incentive for efficient operations and for attracting desirable employees and cementing employee relationship with the Company.

During the year the Profit-Sharing Fund purchased from the estate of E. F. McDonald, Jr. 30,000 shares of Zenith common stock and thus became the largest Zenith stock-

holder, owning slightly more than 7% of the total outstanding stock. It is felt that this additional stock ownership will augment and intensify the incentive of Zenith employees to reduce costs, improve performance and increase profit.

### RESEARCH AND NEW PRODUCTS

During 1958 several of the products of your Company's past efforts in research and development were announced and offered for sale. The first of these, made public in August, was a wide band, low noise, high gain Parametric Amplifier Tube which can greatly extend the effective range of military defense radar used in distant early warning systems for detection of unfriendly aircraft, as well as the range of inter-continental missile and earth satellite tracking systems.

In September our subsidiary, The Rauland Corporation, announced the successful development of the first large size, all-purpose image amplifier tube for medical x-ray. This new x-ray device permits a physician to examine a large image at least 350 times brighter than that shown on present fluorescent screens and reduces substantially the total amount of radiation to which both patient and physician are exposed during x-ray examinations.

The Company's research subsidiary, Zenith Radio Research Corporation, Redwood City, California, is now producing new type flash x-ray equipment designed to take x-ray type shadow pictures of high speed phenomena such as the fragmentation of bullets and shells and the "burning" pattern of solid and liquid fuel propellants used in rocketry and missile work.

During the year, your Company purchased the entire capital stock of Central Electronics, Incorporated, of Chicago, which had been in business since 1950 producing high quality single sideband equipment for radio amateurs, and other electronic products.

While Central Electronics, Incorporated, has not been a large operation in the past, your Company feels that the potential of its products in the amateur field and in the fields of military and general communications is very attractive.

The advantages and potential of the Company's new developments and products are more fully described in the Products Section of this report.

During 1958 laboratory facilities were completed which permit the making of experimental transistors of various types, as well as other more sophisticated semi-conductor devices. With these new facilities, it is possible to tailor-make semi-conductor devices in conjunction with circuit applications.

Research is continuing in the ceramic condenser field. Your Company has conducted a ceramic condenser manufacturing operation for many years, supplying a large part of its own requirements. Basic studies are also continuing in the physics of solids and in the physics and chemistry of solid surfaces.

The Company has produced in its laboratories transistorized television receivers and, in conjunction with The Rauland Corporation, is continuing research and development on color television receivers and tubes so that the Company will be prepared to enter into the manufacture of these receivers and tubes when the time is appropriate.

### OUTLOOK

The improvement in business conditions which began last year is continuing into 1959 and is expected by many economists and business men to accelerate in the 1960's.

In our own industry there are indications that 1959 may show a substantial recovery from the depressed levels of 1958. Many of the pertinent marketing factors, such as population growth, household formation, replacement and obsolescence of existing equipment and the intent to purchase additional sets for the home all point in the direction of future substantial growth.

These factors will be strengthened by improved performance features, the gratifying public acceptance of operating improvements such as your Company's exclusive Space Command Remote Control feature and the outstanding values which the industry is offering in comparison to other products.

We remain firmly convinced that the number of television sets in use will grow steadily from its present 50,000,000 units to 70,000,000 units or more. This growth can be accelerated if the character and quality of present television programming is upgraded to a more desirable level either by the networks and sponsors or by the addition of a supplemental subscription television service.

The same force, namely, improved and increased programming would also be a stimulant to the future public acceptance of color television if it is combined with a more realistic pricing approach which would make the public understand that color television will have to be a deluxe supplemental service for many years in the future rather than an immediate replacement for monochrome television.

The increased usage of transistors in new and novel applications in radio receivers continues to expand this market and gives indication of substantial continued growth.

The category of phonographs and stereophonic high fidelity instruments gives promise of becoming increasingly important as the consumer learns to appreciate the high quality of musical reproduction which can be made available in the home.

The increased stature which your Company has attained within the industry and with the consumer, and its present strong momentum are sound foundations for a continuation of Zenith's progress, but in this intensely competitive industry we realize that it will require our continuing best efforts and ingenuity to maintain our leadership.

It is impossible at this time to make an intelligent forecast of the future sales potential of the new developments and products which your Company has introduced this year, but based on the interest which the prospective users have shown, there is good reason to feel optimistic about their future.

Your management wishes to acknowledge the fine cooperation, loyalty and conscientious efforts of its employees, directors and officers, and express its gratification and appreciation of the results of their teamwork.

The Company's outstanding distributors and dealers made significant contributions to your Company's progress during the year and your management is deeply grateful for their support and loyalty.

This report is made for the information of stockholders in accordance with the established custom of the management and is not a representation, prospectus or circular with respect to the shares of the corporation.

Respectfully submitted,

*Hugh Parson*

*President*

March 6, 1959

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1959

# TO THE STOCKHOLDERS

## OF ZENITH RADIO CORPORATION

Your Company's continuing progress and sound growth during the year ended December 31, 1959 (the 41st since the business was established) was highlighted by many accomplishments and milestones.

Zenith Radio Corporation during the year:

1. Established a new record in production and sales—for the second successive year.
2. Established a new record in earnings—for the second successive year.
3. Produced and sold more than 1,000,000 television receivers, a 40% increase over the Company's previous record established in 1958, as compared to an over-all industry increase in shipments of only 24%..
4. Obtained the highest share of total industry TV volume in its history and further strengthened its claim to No. 1 position in the production and sale of television receivers.
5. Produced and sold the greatest number of home radio receivers in its history and significantly increased its share of the industry radio business.
6. Established a new record in the production and sale of transistorized portable radios—a significant 53% increase over the previous year.
7. Increased production and sales of phonograph and high fidelity stereo units over 1958.
8. Maintained its position as the leading factor in the hearing aid industry.
9. Continued its progress in research and in other activities looking toward the future.

### EARNINGS AND FINANCIAL

For the second successive year Zenith Radio Corporation and its subsidiaries set a new record in consolidated earnings. Net profit of $16,630,144 was equivalent to $5.63 a share on the 2,954,784 shares outstanding at December 31, 1959. This represented a 37% increase over the $12,116,165, or $4.10 a share, earned in the previous year.

Contributing to this substantial gain in earnings was the increase in consolidated sales. The record sales volume of $280,033,866 reached a new high for the second consecutive year and represented an increase of 33% over the sales of $195,041,624 reported for the year ended December 31, 1958.

Your Company's consolidated financial position at year-end showed continued improvement. Working capital at December 31, 1959 was $61,403,593, an increase of $8,409,108 from the $52,994,485 reported last year. The accompanying consolidated balance sheet as of December 31, 1959, certified by our auditors, reflects this continued strong financial position.

Cash and Government securities, after allocation of $14,400,000 in Government securities to provision for Federal income taxes, totaled $54,223,917, an increase of $7,045,432 over December 31, 1958.

Accounts receivable of $21,564,293 (net of reserves) increased $4,139,206 from the previous year. This increase of 24% is accounted for by the earlier mentioned 33% increase in sales volume. Included in the total receivables is $1,000,000 representing the annual installment of the litigation settlement due October 1 of the ensuing year.

Total inventories of $21,157,569 were $4,916,954, or 30%, above the $16,240,605 reported at December 31, 1958. The increase in both in-process and finished goods inventories is attributable to expanded sales volume and larger production schedules for the first quarter of 1960.

### SUBSIDIARIES

The Rauland Corporation, our subsidiary engaged principally in the manufacture of cathode ray tubes, reported increases in both sales and profits primarily as a result of Zenith's increased requirements of cathode ray tubes.

Wincharger Corporation, the Company's subsidiary which manufactures small radio receivers under contract for the parent company, dynamotors for Government contracts, electric motors and power generators, was adversely affected by a two-month strike, but nevertheless, reported satisfactory sales and profits for the year.

The Company's wholesale distributing subsidiaries in New York and Chicago reported substantially increased profits primarily as a result of record sales.

Zenith Radio Corporation of Canada made substantial progress during the year, but a continuation of the heavy costs in connection with the new radio and television receiver distribution activities unfavorably affected earnings.

Central Electronics, Inc., the Company's subsidiary engaged principally in the manufacture of single side band transmitters, was unable to show a profit for the period primarily as a result of continued heavy engineering and startup costs on its popular new transmitter.

A new subsidiary, Zenith Sales Corporation, which will perform the marketing function for Zenith Radio Corporation, commenced operation on January 1, 1960. It will be responsible for sales, distribution, product planning, advertising, sales promotion and market research for television, radio, phonograph and stereophonic home instruments in the United States and export markets.

### DIVIDENDS

On January 30, 1959, the Company paid dividends of $2.00 per share (declared out of 1958 earnings) on the then outstanding 984,928 shares of common stock and on March 31, 1959, 75¢ was paid on this stock. (This was equivalent to 66⅔¢ and 25¢ per share respectively on the 2,954,784 shares presently outstanding.) The Company also paid dividends of 25¢ per share on June 30, 1959, and 40¢ per share on September 29, 1959 and December 29, 1959. An extra dividend of 65¢ per share, also paid on December 29, 1959, brought the total *paid* for the year to $2.61⅓ on the presently outstanding 2,954,784 shares. (A special dividend of 65¢ per share payable January 29, 1960, declared out of 1959 earnings, made a total of $2.80 per share *declared* during the year.)

### PRODUCTS AND MERCHANDISING

Forty-one years ago your management adopted a policy of specializing in radionics exclusively, devoting all its time, effort and resources to development, production and merchandising of high quality products with exclusive new features. The basic objective of this policy was to satisfy customers through emphasis on quality and value. Your Company's progress in 1959, its most successful year to date, can be traced directly to the sound business decisions made forty-one years ago.

The television receiver industry showed in the strong national economy which prevailed during 1959 and increased factory shipments of television receivers from 6,081,000 in 1958 to 6,778,478, an increase of 14%. Without the benefit of Zenith's better than average gain over 1958, the industry increase in shipments would be less than 12%.

Your Company's better than average increase in television sales over 1958 is directly attributable to the following factors:

a. The high quality and excellent performance of the Company's television receivers.

b. Outstanding demonstrable technical advantages.

c. Pleasing appearance and diversified cabinetry to suit all tastes.

d. Intelligent, aggressive merchandising and advertising which brought before the dealers and the public the amazing value Zenith receivers represent the best values for customers and the greatest merchandise for dealers.

Sales of receivers incorporating the Company's exclusive and patented Space Command television remote control increased 110% over the preceding year, reflecting the popularity of the 17" slim line receivers which incorporated this feature for the first time.

The obvious advantage and convenience of this original and exclusive Zenith engineering achievement which makes use of ultrasonic or "silent sound" to activate and control a television receiver from across the room, prompted many manufacturers to market their own type of remote control devices, some of which, in the opinion of our counsel, infringe Zenith patents.

The Company continued to feature the "Sunshine" picture tube (developed by The Rauland Corporation), which requires far less video drive than conventional tubes and permits the television circuits to be broad-banded to get more "sparkle" in the form of more detail and information. The 100% higher efficiency of the new electron gun allows up to 250,000 cycles more picture information to reach the screen for better picture detail.

The Company continued its policy of incorporating technical advances and improvements in its receivers only after development and adequate testing to insure high quality performance. Thus in 1959 the Company produced receivers with 110-degree deflection picture tubes only after several years of development work on circuits and on the tubes themselves to insure the same high quality performance offered with the 90-degree tubes.

In the line of TV receivers introduced in June, 1959, all 21" models were offered with 20,000 volts of picture power, a feature which previously had been offered only on the highest priced models. The new line introduced a new Super H-20 Horizontal type television chassis with hand wiring and all connections carefully hand soldered. Cascode tuner components were firmly fastened to the printed circuit board to make shielding requirements unnecessary, long lasting and economical when required.

The decision to make a television receiver as serviceable as possible, and still economical to service when necessary, is one that must be made when the receiver is being engineered and designed, and kept in mind during all the engineering and production processes.

The new television sets also continued to feature the Zenith "Trimm lock" circuit using the Zenith developed "Golden Sentinel Tube" for greater picture stability and offered Zenith advanced color as its new exclusive improvement including DF circuit stabilizer and the "Gated Beam" circuit stabilizer.

Both categories of the Company's TV receiver business, table models and consoles, showed increases over the previous year of 30% and 48% respectively.

Several new models were introduced in December, 1959 incorporating the new 23" picture tube with bonded protective glass, offering the advantages of a new, larger, more rectangular picture shape and overcoming the problem of cleaning dust which adheres to the face of the tube.

In radio receiver production and sales your Company attained an increase of 32% over 1958 as compared to industry increase of 21%. Significant increases were achieved in the categories of FM/AM receivers and transistor portable radios, in which categories your Company has enjoyed a leading position for many years.

The FM/AM category was augmented by the addition of several new models, including a new high fidelity deluxe model, the "Super Interlude", and a low priced FM only table model in a compact cabinet.

A new transistorized FM/AM portable, the Royal 2000, is scheduled for introduction in March. This receiver, the first of its type to be produced domestically, may be favorably compared with the Royal 1000 transistorized Trans-Oceanic short wave receiver which, with its tube type predecessor, the B600, has been the standard of the industry for almost 20 years. The new FM/AM portable receiver offers high performance and excellent sound reproduction on both FM and AM, with effective automatic frequency control on FM and other advanced features.

The 53% increase in the sale of the Company's transistor portables is attributed to the public's continued recognition of the outstanding quality, high performance and greater dollar value offered by these sets. This is particularly significant in view of the increasing competition of imported Japanese transistor sets and cheap sets produced domestically from imported Japanese parts.

The Royal 500E, the acknowledged leader of all pocket type transistor radios, continuously improved in performance and features since its introduction in 1957, showed a very substantial increase in sales over any previous year. The line of transistor portables was augmented by a powerful all-transistor portable radio, the Royal 250, with a suggested list price of $39.95 so that Zenith dealers were able to offer attractive merchandise in all price ranges from $39.95 to $275.00 for the model Royal 1000D.

As a part of the Company's program of further miniaturizing portable transistor radios, a new model, the Royal 100, has been developed and is presently being shipped. This is the smallest portable produced to date by Zenith and offers excellent performance without the technical compromise of some smaller competitive models. The set uses 6 transistors plus 2 diodes and other thoroughly tested components, and conventional Penlite batteries.

The category of record players, high fidelity phonographs, and stereophonic high fidelity phonographs and combinations continued to increase in importance during 1959 both as a result of increased public interest and the new features offered by the Company's products.

A basic technical advance in stereo sound reproduction was introduced in our deluxe record playing instruments. This exclusive Zenith feature, called "extended stereo", gives the user control over the degree of stereo effect. This control ranges from "monaural" effect (no stereo) to "standard stereo", which corresponds to ordinary stereo reproduction and to "extended stereo", which provides an enhanced stereo effect making the sound directionality more realistic and giving the desirable illusion of increasing the separation of the speakers in a single unit cabinet. In addition, the stereo balance adjustment is made less critical and becomes in effect automatic.

Another advance in stereo sound reproduction is the use of small middle and high-range speakers in very small enclosures to permit placing these speakers with wide

separation in rooms where a conventional large remote speaker cabinet cannot be accommodated. This development stems from the technical finding that the direction of a sound source is perceived through the middle and high frequencies, making it unnecessary to use more than one low-frequency or woofer speaker cabinet.

Well-planned merchandising and advertising activities continued as an important factor contributing to the increased sales volume and greater stature within the industry which your Company enjoyed during the past year. Much thought and planning went into product development, designing, engineering and selection of merchandise to provide attractive merchandising features and intelligent price value comparisons.

Aggressive merchandising programs made available to our distributors provided substantial incentives for Zenith distributors and dealers to increase their purchases and displays of Zenith merchandise. These programs proved to be an outstanding success at both the distributing and dealer levels. Effective point of sale and newspaper campaigns were used to support these merchandising programs, and well-planned national magazine advertisements, featuring quality and value, completed and integrated the entire program.

Continued close control of production and merchandise inventories at every level, factory, distributor and dealer, was recognized as alleviating one of the major elements of risk in this fast changing industry, namely the deterioration of inventory values which occurs when manufacturers, distributors or dealers become overstocked and are faced with inventory liquidation.

## HEARING AID

The Company's Hearing Aid Division continued as the leading factor in the industry in 1959 and introduced several new, imaginative products to better serve hard-of-hearing people throughout the world.

One important new product was the "Extended Range" model, the world's first high fidelity hearing aid. The result of many years of engineering research, this advanced instrument is bringing hearing to thousands who could not be adequately helped by former instruments. Zenith advances in circuitry design make it possible for the "Extended Range" to reproduce and amplify a 96% greater range of sound frequencies than ever before possible, with virtually no distortion or background interference. Dealer and public acceptance proves its tremendous performance and sales potential.

Zenith continued to engineer and produce hearing aids that would appeal to the style conscious and bring better hearing to more of the hard-of-hearing. The new Medallion eyeglass model, the world's smallest and slimmest eyeglass hearing aid, gives Zenith additional sales potential in this important segment of the market. Extensive research and development produced new, miniaturized components to make this possible.

New sales fields were opened by the introduction of a diagnostic audiometer, the ZA-300 Audio Analyzer, which provides further opportunity to better serve otologists, clinics, hospitals, and other professional groups. This is another step by Zenith to create added sales potentials in the field of hearing conservation.

While new products and improvements are always essential to growth, steps were taken in 1959 to further strengthen our marketing procedures. Intensified market studies and a continuing program of improving our dealer structure will permit us to continue to grow in the hearing aid field and further increase our leadership.

The Hearing Aid Division moved to larger quarters during the year, where engineering, sales, advertising and administration are now coordinated in one building.

New products, improved facilities and new marketing programs indicate that growth of the Hearing Aid Division in 1960 will be even greater and more profitable.

## EXPORT

The Company's 1959 export sales (excluding Canada) of television sets, radio receivers, phonographs, and stereophonic instruments were down less than 1% from 1958. This was a remarkable record in the face of adverse factors and conditions that faced the general export market for those products in 1959. During the year, important large markets for U.S. radio, TV, and phonograph products such as Argentina, Cuba, Colombia and Venezuela, imposed further severe or new restrictions to make the importation of such products practically prohibitive.

Another serious deterrent to U.S. exports, particularly of radios, during the year was the severe foreign competition from Japan, which flooded practically all world markets with a wide range of cheap transistor products at very low prices. The impact of Japanese competition has been much stronger in export than in the domestic market.

Our exports to Europe in 1959 improved slightly due particularly to the appointment in mid-year of an energetic independent distributor in the United Kingdom. For almost 30 years previously, the British market had been closed to our products because of cartelization and restrictions. Since July, 1959, our exports have been increasing, concentrated, however, in several models which have no direct counterparts in British production.

Our sales to the U.S. Armed Forces Overseas PX's gained 18% in 1959 over 1958, reversing for the first time in several years the declining trend of these sales. There was a substantial increase in TV sales and there are signs that the overseas PX's, especially in Europe, are showing preference for U.S. products after several years of handling cheaper products of foreign competition.

In the light of the unfavorable trading factors and adverse conditions which exist in many major world markets, 1960 can be another difficult year for U.S. exports.

The Company's Canadian subsidiary, Zenith Radio Corporation of Canada Ltd., showed marked progress in the sales of all products. The long established Hearing Aid Division continued its steady growth in sales and profits. The Radio and Television Division, established in 1958, doubled its sales over the first year and in the closing months achieved a substantial gain in its percentage of industry sales despite a decline in over-all Canadian industry sales of television receivers. This gratifying performance emphasizes the wide acceptance of Zenith products by the Canadian trade and public.

Zenith now has a strong distribution network at both the wholesale and retail level throughout Canada, supported by powerful national and local advertising.

Our Canadian management is confident that Zenith sales and profits together with its percentage of industry sales will continue to rise throughout 1960.

## PHONEVISION

The 1959 order of the Federal Communications Commission, which reauthorized a three-year commercial trial period for subscription television, was another important milestone in the development of Phonevision, the trade name used to designate the Company's systems of subscription television.

The original authorization issued in 1957 had been suspended in 1958 to permit further investigation by Congress and the FCC. In the past year, however, spurred on by growing public demand for better programming,

the FCC renewed its original authorization, in slightly modified form, with the tacit approval of Congress. The terms of this order are set forth in the Phonevision section of this report.

During the year, the Company has been in negotiation with several organizations looking forward to an arrangement for conducting the test proposed by the Commission order. It is expected that an announcement regarding the status of these negotiations will be made in the near future.

Progress was made during the year in refining and simplifying decoder designs and continuing studies were made of the business procedures associated with a subscription television service.

## FACILITIES

The plant at 6501 West Grand Avenue, Chicago, purchased in February, 1959, was placed in operation during the summer equipped with the most efficient and modern production facilities.

Later in the year, construction was begun of a new $1,250,000 addition to the Company's plant at 1500 North Kostner Avenue, Chicago. Both of these plants will be used to provide expansion and re-location of manufacturing and assembly operations now at the Kostner Avenue and at the Zenith main plant, and for expansion of the Company's components manufacturing activities.

Late in December, Zenith Radio Research Corporation purchased a 30,000 square foot modern building on a 2.86 acre site, plus an adjoining 2.5 acre site in Bohannon Industrial Park at Menlo Park, California.

This facility will be used for the expansion of research laboratories and production facilities for the Company's microwave products such as the parametric amplifier tube and associated devices and systems which are now presently in a smaller plant at Redwood City, California.

These added facilities, plus other programs not yet finalized, are a part of the $7,500,000 expansion program authorized by the directors of the company on November 25, 1958 to take care of the Company's expanded production requirements for radio, stereophonic phonographs and television receivers and other products which the Company expects to market in the future.

The new Display Salon at 200 North Michigan Avenue, Chicago, which was opened to the public in June, 1959, has increased store traffic 300% over its previous location and has produced the same favorable results obtained from the public display salon at 666 Fifth Avenue, New York City. These beautiful public display salons have more than proven their value on a local, national and international scale.

## LITIGATION

During the year extensive discovery proceedings were conducted in preparation for trial in the Company's law suit against Marshall-Wells Company for unfair competition in its use of the Zenith trademark in merchandising of Zenith-branded kitchen and laundry appliances. The suit, in which damages and injunctive relief are sought, was filed on January 10, 1958.

With respect to the litigation commenced on February 11, 1958 in the Federal Court in Chicago, Illinois, charging Admiral Corporation with infringement of Zenith's patents on its Fringelock circuit and its Space Command remote control system, and with having willfully and knowingly copied Zenith's Space Command system, pre-trial discovery has been virtually completed. During the year the Company filed a similar suit against Admiral Corporation in the United States District Court for the Western District of Oklahoma.

On April 15, 1959, the Company filed suit in the United States District Court for the Northern District of Illinois against Motorola, Inc., of Chicago, charging it with infringement of five Zenith patents on its Fringelock and Space Command features.

On November 20, 1959, the Company was sued by Hazeltine Research Inc. for alleged infringement of a single Hazeltine patent which assertedly covers the use of gated automatic contrast control in television receivers. In the opinion of counsel, no valid claim of the Hazeltine patent is infringed by the Zenith receivers.

There has been no change in the status of the arbitration provided for under the settlement agreement which terminated the litigation between Zenith Radio Corporation and RCA et al.

The Company is also involved in certain other actions arising out of matters incident to the ordinary conduct of its business and adequate provision has been made for any possible liability resulting therefrom. In the opinion of management and counsel the outcome of the foregoing litigations should be favorable to the Company.

## EMPLOYEE RELATIONS

During the year the Company continued to enjoy an excellent relationship with its employees and the unions representing its hourly paid employees. The strike at the Wincharger Corporation is the only major disturbance in the history of the Company's labor relations.

Over 600 employees with more than 15,000 years of accumulated service are now members of the Zenith Pioneers—employees with more than 20 years of continuous service with the Company.

The Zenith Profit-Sharing Retirement Plan, which commenced operations in the year ended April 30, 1950, continues to show great value as an incentive for efficient operations and for attracting desirable employees and cementing employee relationship with the Company.

The Profit-Sharing Plan during 1959 made additional purchases of Zenith Radio Corporation common stock, as well as various other investments, and continues as the largest Zenith stockholder. Ownership of Zenith stock by the Plan will augment and intensify the incentive of Zenith employees to reduce costs, improve performance and increase profit.

## RESEARCH AND NEW PRODUCTS

Your Company is continuing its heavy emphasis on engineering and research because from these processes are born the outstanding exclusive developments and the built-in quality, performance and value that have enabled Zenith to maintain its growth. From this source also can come products leading to a desirable diversification of your Company's activities.

The Company's success in product design engineering is directly related to its advance development activities which lead to future products. Extensive tests involving many hard-of-hearing subjects indicated that a significant improvement could be made in hearing aids by extending the response to both higher and lower frequencies. The Company's transistor research group developed circuits to give this desirable response and without excessive battery drain. The result of these basic studies is the new "Extended Range" hearing aid described elsewhere in this report. The tremendous acceptance of this new hearing aid shows graphically the benefits to be derived from this type of aggressive research.

Continuing efforts are being made toward miniaturization of radio and television receivers to make possible compact efficient portable models. Basic improvements

are being made in such fields as wireless remote control for television, new circuits, picture tubes for higher quality television receivers, high voltage research for television and high-performance radio circuits. Substantial progress has been made on a new method of obtaining improved stereophonic and high fidelity techniques in broadcasting as well as in our own consumer products.

Zenith research has consistently taken the view that the best performance of electronic devices can be achieved only where the individual scientist or engineer is entirely familiar with all parts and functions of the device.

Accordingly, Zenith research has avoided extreme specialization of the sort which results in the development of experts who know all about a vacuum tube or transistor and practically nothing about the circuit in which it works or vice-versa. This unified attack has in the past resulted in such developments as the 6BN6 limiter-discriminator tube and associated circuits, in the development of fringe lock and many other technical advances.

The problems of transistors and transistor circuits have been approached in the same way, the possibilities of both transistor and circuit and their limitations being constantly kept in mind, and by the same person. As a consequence, your Company now has in pilot production new transistors specifically designed together with their circuits for optimum performance.

Some equipments utilizing these newly developed transistors and circuits are expected to go into production during the coming year.

The electron-beam parametric amplifier, invented and developed by Zenith research scientists, and announced in mid-1958, has continued to set the pace for outstanding low-noise amplifiers in the UHF and microwave frequency range. Efforts to expand the usefulness of this device have led to significant advances in low-noise performance and extensions of the operating frequency range.

An important development for radar applications, a mode of operation known as "synchronous pumping" was reduced to engineering practice within the past few months. This makes possible the full utilization of the low-noise potentialities of the quadrupole amplifiers in high-performance moving target indicator radars. Development of practical radar preamplifiers and testing of the system on an actual operational radar began in February, 1960, with excellent results. Performance improvements in usable sensitivity were obtained equivalent to a 50% increase in range or a 125% increase in area covered.

Complete Zenith parametric amplifier units are now under test and in use throughout the United States and abroad. Typical users include radio astronomers at AFCRC, Cambridge, Massachusetts, and Jodrell Bank, England; National Aeronautics and Space Administration, Redstone Arsenal, and The Martin Company are making use of these units in missile and satellite tracking systems; experimental equipment for radar applications are under test at the Rome Air Development Center, Raytheon Corporation, MIT Lincoln Laboratory, and Marconi Wireless Company. Other fields of application under investigation include tropospheric-scatter communications, reconnaissance receivers, and radiometry.

The Company's research subsidiary, Zenith Radio Research Corporation, continued to produce new type flash x-ray equipment and has also made significant contributions to the development of the parametric amplifier.

The special products group also developed a portable transistorized Secondary Time Standard which makes possible the measurement of time intervals with extreme accuracy. This lightweight instrument has usage in cosmic ray measuring equipment, scintillation and other sophisticated counters used to detect and measure radiation from outer space, etc. It can also be utilized industrially with measuring equipment used to record flow, viscosity, temperature, etc. in oil and gas pipelines.

The image amplifier tube for medical x-ray developed by our subsidiary, The Rauland Corporation, has been in production during the past year and improvements have been made increasing brightness amplification from 350 times brighter to 1,000 times brighter than that shown on present fluorescent screens.

Central Electronics, Inc., after many engineering and production delays necessitated by its unwillingness to compromise with the performance potential of its advanced type single side band transmitter, appears to have solved its production problems and is now making regular deliveries against its order backlog.

Over the years, the Company has spent millions of dollars in continuing research and development on color television receivers and tubes and is prepared to enter into the manufacture of these receivers and tubes when the time is appropriate.

## OUTLOOK

Your management is looking forward to the year 1960 with confidence and optimism. The improvement in business conditions which was evident in 1959 is expected by many economists and businessmen to accelerate or at least continue in 1960.

In our own industry, there are many indications that 1960 will show a substantial improvement over 1959.

The demands of a growing population with higher personal incomes and confidence in the future based on a high level of business activity can only result in a higher standard of living and a larger demand for our products. Because we are operating to a large extent in a replacement and second set market, the greater sophistication and intelligence of our customers based on their experience with our products and competitive products is of particular advantage to a company like Zenith which has over the years earned a reputation for high quality, great value, dependability, and the greatest technological improvements and conveniences.

In addition, your Company will have the benefit of the increased stature and momentum which we have attained within our industry.

The success which your Company has had in the past years was entirely the result of the outstanding efforts of people—our employees, our dealers, our distributors and the employees and management of our thousands of suppliers. Your management wishes to express its thanks and appreciation for their fine cooperation, loyalty and conscientious efforts, and particularly to express its thanks to its millions of satisfied and loyal customers.

This report is made for the information of stockholders in accordance with the established custom of the management and is not a representation, prospectus or circular with respect to the shares of the corporation.

Respectfully submitted,

Hugh Robertson

Hugh Robertson, *Chairman*

Joseph S. Wright

March 8, 1960

Joseph S. Wright, *President*

1960

# TO THE STOCKHOLDERS *of Zenith Radio Corporation*

During the past year, in common with most companies, Zenith was subjected to the pressures accompanying a general decline in economic activity. Nevertheless, your management is pleased to report that both sales and earnings in 1960 were the second highest in Zenith's 42-year history, exceeded only by the record year of 1959.

Our operations were affected as the normally competitive conditions in the consumer electronic industry intensified with the decline in industry volume. In addition to the impact of the external forces, sales and profits were adversely affected also by the strike in August which shut down Zenith's main plants for the first time in the company's history.

## EARNINGS AND FINANCIAL

Consolidated net income for the year was $15,225,819, or $5.11 per share, on the 2,978,614 shares outstanding at December 31, 1960. This represented an 8% decline from the record earnings of $16,630,144, or $5.63 per share, reported for 1959 on the then outstanding 2,954,784 shares. However, earnings were 26% above the previous second best year of 1958, when net profit had been $12,116,165, or $4.10 per share.

Consolidated sales for the year of $254,111,740, also representing Zenith's second best year, were 2% below the record $260,033,866 reported for 1959 but 30% ahead of the previous record set in 1958.

The accompanying balance sheet as of December 31, 1960, certified by our auditors, reflects a continuation of the strong financial position of your company. Working capital of $68,286,118 at December 31, 1960 was $6,861,535 greater than at the end of the preceding year.

Cash and Government securities, after allocation of $14,400,000 in Government securities to provision for Federal income taxes, totaled $59,700,837, an increase of $5,476,920 over December 31, 1959.

Accounts receivable (net of reserves) of $18,204,721 and inventories of $19,459,297 were down from the year before, reflecting the decline in sales and production during the latter months of 1960.

## SUBSIDIARIES

The subsidiary companies reported generally satisfactory operations for the year. However, abnormally high costs incurred by The Rauland Corporation in starting production on several new types of cathode ray tubes had an adverse effect on their profits.

Central Electronics, Inc., engaged principally in the manufacture of single sideband transmitters, continued to experience heavy costs in further refining its products and manufacturing processes.

Zenith Sales Corporation, responsible for the marketing of Zenith consumer products in the domestic and export markets, completed its first year of operation. Your company's better than average showing for the year can be attributed in large measure to the timeliness and effectiveness of the marketing subsidiary's programming.

## DIVIDENDS

On January 29, 1960 the company paid a special dividend of 65¢ per share (declared out of 1959 earnings). In addition the company paid dividends of 40¢ per share on March 31, 1960, June 30, 1960, September 30, 1960 and December 29, 1960. An extra dividend of 50¢ per share was also paid on December 29, 1960, which brought the total *paid* for the year 1960 to $2.75 per share.

A special dividend of 50¢ per share payable January 27, 1961 was also declared out of 1960 earnings, making a total of $2.60 per share *declared* during the year.

## PRODUCTS AND MERCHANDISING

In 1960, for the second successive year, Zenith produced and sold more than one million television receivers. In maintaining a level of television unit sales down only slightly from the record year of 1959, while industry sales declined substantially, your company significantly increased its share of the total industry volume and further strengthened Zenith's No. 1 position in the industry.

Radio receiver unit production and sales established a new record, exceeding the previous best year of 1959. Significant increases were achieved in the categories of AC-DC receivers, clock radios and FM-AM receivers.

Stereophonic sound has become the dominant factor in the high fidelity market with stereo instrument sales taking the lead over monaural by a three-to-one ratio. Difficulties in procurement of critical components held back our sales during the year. However, your company plans to play an increasingly greater role in this growing segment of the home entertainment market.

The reliability, performance and convenience superiority of Zenith products were strengthened during the

year with the introduction of a number of new models incorporating exclusive features.

Introduced during the year, to assure the finest television picture reception, even in weak signal and fringe areas, was the "Gold Video Guard Turret Tuner." An added convenience of the new tuner is the "Perma-Set" feature which enables the user to permanently tune each channel separately from the front of the set.

The exclusive Space Command remote control, making use of ultrasonic or "silent sound" to control a television receiver from across the room, was improved with a newly designed mechanism for changing channels faster and more quietly.

Transistor portables, a category in which Zenith has continually held a leading position, were further strengthened during the year by the addition of several new models. The new transistorized FM-AM portable introduced in the spring, the Royal 2000, received an enthusiastic reception. Representing an industry first, this new Zenith receiver offers high performance and excellent sound reproduction on both AM and FM, with automatic frequency control for "drift-free" FM tuning and other advanced features.

During the fall the shirt pocket size Royal 50 was introduced to further augment the Zenith line of transistor portable radios. This model is the smallest and lowest priced transistor radio the company has yet produced, and while completely American in design and manufacture, it is priced competitively with imported Japanese radios. With the introduction of the Royal 50, with a suggested list price of $29.95, Zenith dealers are able to offer a complete line of transistorized portable radios in all price ranges from $29.95 to $275.00.

The outstanding contribution to stereo reproduction in 1960 was the introduction of the Zenith "Stereo Professional" record changer. This exciting new record changer, the first specifically designed for the exacting requirements of stereo reproduction, is the outgrowth of several years of work in our engineering laboratories.

These, and many other outstanding features, have contributed to the prestige and acceptance of Zenith products at the market place. Representative Zenith products and some of their exclusive features are highlighted later in the report.

Intelligent, aggressive merchandising and advertising continue to play an important role in keeping our dealers and the public informed of the reasons Zenith products represent the best value for the consumer and the soundest merchandise for the dealers. Well-planned and integrated advertising and merchandising campaigns, utilizing point of sale, local newspaper and national magazine media, provide our distributors and dealers with powerful tools for stimulating the sale of Zenith products.

In summary, your management continued its historically successful marketing philosophy of providing:

1. High quality and excellent performance.
2. Outstanding demonstrable technical advantages.
3. Pleasing appearance and diversified design to suit all tastes.
4. Effective advertising and merchandising programs.
5. Close control of product inventory at factory, distributor and dealer levels to avoid obsolescence and subsequent price deterioration.

## HEARING AID

The company's Hearing Aid Division further strengthened its position as the world's leading producer of quality hearing aids. During the year eight new instruments were introduced, bringing the complete line to twelve hearing aids, with models designed for every electronically correctible hearing loss—slim eyeglass models, compact behind-the-ear hearing aids, and advanced design conventional instruments.

Outstanding public acceptance of the new hearing aids, setting new standards of quality, appearance and performance, permitted your company to make a further penetration of the growing hearing aid market.

## EXPORT

Export sales of radios, television receivers, phonographs and stereophonic high fidelity instruments in 1960 showed a moderate decline from 1959. Major contributing factors to this expected decline were the loss of Cuban sales and the imposition of new or more rigid import restrictions in such important markets as Argentina, Chile, Brazil and Mexico.

Competition from both U.S. and foreign manufacturers was extremely severe in all major overseas markets. Foreign manufacturers had the advantage of low labor rates, enabling them to offer lower priced products.

Even though a large number of restrictions will continue in major export markets, the outlook for 1961 is optimistic. The anticipated improvement of the balance-of-payments picture and a new climate of cordiality towards the U.S., especially in Latin America, should assist the U.S. in its promotion of exports and the drive for gradual reduction of foreign trade restrictions.

Zenith Radio Corporation of Canada, Ltd., in 1960 successfully countered the downward industry sales trend (which began in Canada in 1955) and made important gains in the sale of Zenith television and radio receivers.

The company's Canadian management is confident that 1961 will see further increases in sales and profits

and a rise in its share of industry sales, despite the possibility that total Canadian industry sales may continue to decline. Plans are being readied for a manufacturing operation in Canada when the Canadian subsidiary's annual unit sales volume permits.

### PHONEVISION

The F.C.C. approved in February, 1961 the application of Hartford Phonevision Company for a three-year test of pay television at Hartford, Connecticut. RKO General, Inc., Teco, Inc., and Zenith Radio Corporation also joined in the application.

This will be the first full-scale test of Phonevision, the trade name used to describe Zenith's subscription TV systems. A review of Phonevision activities begins on page 22 of this report.

### COLOR TELEVISION

In February, 1961, your management announced plans for the fall introduction of a complete line of new and unique color television receivers. These new receivers are the results of the expenditure of several millions of dollars over a period of eight years of extensive research and development work at Zenith—research aimed at improving the standards of performance and reliability of the receivers in the home. Innovations will include a Zenith developed color demodulation system employing a new tube invented by Zenith scientists. The sets have been especially designed for simplified operation and will have a three-gun shadow mask picture tube with greatly increased brightness. The completely new receivers will include the service-saving features of horizontal chassis design and hand-wired circuits that will improve performance, stability and reliability of color sets, and will achieve the same dependable performance which has made Zenith the number one producer of black and white television sets.

### FACILITIES

During 1960, Zenith Radio Corporation and subsidiaries expended $4,641,000 in the expansion, modernization and replacement of their facilities. Highlights of the important steps taken towards the completion of a $7,500,000 program for the expansion of research, engineering and manufacturing facilities are presented on page 25.

### LITIGATION

During the year extensive discovery proceedings were conducted in preparation for trial in the company's law suit against Marshall-Wells Company for unfair competition in merchandising of Zenith-branded kitchen and laundry appliances. The suit, in which damages and injunctive relief are sought, was filed on January 10, 1958.

The United States District Court for the Western District of Oklahoma, in September, 1960, entered judgment, finding that Zenith's Fringelock and Space Command patents are valid and were infringed by Admiral Corporation. The counterclaim of Admiral, charging your company with infringing a record-changer patent, was dismissed. The case is now on appeal, but in the opinion of counsel, the outcome of the appeal should likely be favorable.

On April 10, 1959, the company filed suit in the United States District Court for the Northern District of Illinois against Motorola, Inc., charging it with infringement of five Zenith patents on its Fringelock and Space Command features. This suit is similar to the suit against Admiral and, in the opinion of counsel, your company should prevail in the litigation. On December 14, 1960, Motorola brought suit in the same court against Zenith, alleging infringement of a television circuit patent. In the opinion of counsel the latter suit is without merit.

On November 20, 1959, the company was sued by Hazeltine Research, Inc., for alleged infringement of a single Hazeltine patent which assertedly covers the use of gated automatic contrast control in television receivers. In the opinion of counsel, no valid claim of the Hazeltine patent is infringed by the Zenith receivers and the patent is unenforceable.

The company is also involved in certain other actions arising out of matters incident to the ordinary conduct of its business and adequate provision has been made for any possible liability resulting therefrom. In the opinion of management and counsel the outcome of these litigations should be favorable to the company.

### EMPLOYEE RELATIONS

In the late summer of 1960, your company, for the first time in its history, suffered a complete work stoppage at its Chicago plants as a result of a strike called by the union representing the hourly paid employees. Your management regrets this unfortunate temporary interruption of the harmonious relationship that had so long existed between the company, the hourly paid employees and the union. The interruption, resulting in substantial loss of wages and profit sharing to the employees, likewise had an impact upon your company's earnings for the year.

The Zenith Pioneers' Club, an organization of employees with more than 20 years of continuous service, has doubled its membership during the last four years. More than 600 employees with an accumulation of over 15,000 years with the company are now members.

The Zenith Profit-Sharing Retirement Plan during 1960 made additional purchases of Zenith Radio Cor-

poration common stock, as well as various other investments, and continues as a major Zenith stockholder. Ownership of Zenith stock by the Plan augments and intensifies the incentive of Zenith employees to improve performance, reduce costs and increase profits.

## RESEARCH AND NEW PRODUCTS

Zenith continued to expand its program of bringing the benefits of science to the home, industry and government.

Research and engineering, directed exclusively to electronics, has been a major contributing factor to the growth and acknowledged leadership of your company in the electronics field. It is the source of new and improved products incorporating exclusive developments which mean better quality, performance and value for the consumer. From research come the ideas for products to further our diversification and growth—products contributing to the security, health and enjoyment of the people of the free world.

During the year improvements and modifications were made in the electron beam parametric amplifier, invented and developed by Zenith scientists. The parametric amplifier is finding increased acceptance as a low noise, highly stable amplifier for extending the range of radar, radio telescopes, missile tracking, aerial navigation and other systems in the UHF and microwave frequency ranges. Our California subsidiary, the Zenith Radio Research Corporation, is making substantial contributions to the design and improvement of the amplifier for defense and industrial application.

Flash X-ray is one of the other major development projects at Zenith Radio Research Corporation. An X-ray system, incorporating The Rauland Corporation image intensifier for industrial applications, created wide spread interest when shown for the first time at a public demonstration in November. Experimental work will continue in the development and design of X-ray systems for specific applications in the industrial and medical fields.

In 1960 The Rauland Corporation further expanded its production and sale of special purpose tubes for industrial and government applications. The image intensifier tube, increasing the brightness of X-ray images approximately 2,000 times, is being used in an increasing number of hospitals and clinics. Rauland's flat face radar and scan converter tubes are used in FAA Air Control Centers throughout the country. It is anticipated that research and development will lead to the further expansion of the subsidiary's special tube sales.

Basic research and development work in many fields of electronics is in progress at our Chicago laboratories. A number of projects, particularly in the fields of solid state physics and microwave communications, are government sponsored.

As a culmination of several years of development work, Zenith participated in a field test of FM-Stereo conducted under the auspices of the National Stereo Radio Committee to bring the advantages of stereo reproduction to radio broadcasting. The results of the test were encouraging in appearing to favor the Zenith developed system of FM-Stereo multiplexing. The Federal Communications Commission is currently studying the results of the test preparatory to issuance of a ruling establishing standards applicable to FM-Stereo broadcasting. However, regardless of the system ultimately specified by the commission, Zenith is in a position to immediately produce and market FM-Stereo receivers to increase the listeners pleasure.

## OUTLOOK

A wide variation of opinion exists concerning the duration and extent of the general economic decline which began last year. A widely accepted theory at the moment is that the nation will resume its long-term growth during the last half of this year. The stature Zenith has attained in the industry and with the consumer provides a sound foundation for continued growth and expansion with the upturn of economic conditions.

Your management views the year 1961 with cautious optimism, although a reversal of economic trends may not immediately alleviate the growing "cost-price squeeze" experienced by most businesses during the past year. The technological progress and competitive climate of the era ahead will provide challenges requiring the best effort and ingenuity of your company management and personnel.

The Board of Directors wishes to express its gratitude for the outstanding efforts of the thousands of people who have contributed to the growth and success of your company. The loyalty, outstanding ability and conscientiousness of Zenith employees, distributors, dealers and suppliers continue as our great strengths.

Respectfully submitted,

Hugh Robertson

Hugh Robertson, *Chairman*

Joseph S. Wright

March 7, 1961 — Joseph S. Wright, *President*

1961

# TO THE STOCKHOLDERS

## OF ZENITH RADIO CORPORATION

The year 1961 was a period of significant progress and continued growth for your Company.

During the year Zenith Radio Corporation and its subsidiaries:

- Established new records in both sales and earnings.
- Introduced two outstanding, new consumer products: color television and Stereo FM receivers.
- Produced and sold more than one million black and white television receivers for the third successive year.
- Attained the highest percentage of total television industry sales to dealers of any year in their history.
- Continued their first place position in the intensely competitive television industry.
- Set a new record in the production and shipment of radio receivers.
- Maintained their position of leadership in the hearing aid industry.
- Significantly increased research, production and sales in the government and special products areas.
- Further strengthened and accelerated their programs in research and development aimed at growth and diversification.

### FINANCIAL

Consolidated net income for the year was at a record high of $18,014,788, ($1.99 per share on the 9,031,542 shares outstanding at December 31, 1961) an 18% increase over the $15,225,819 ($1.70 per share) reported for 1960 and 8% over the previous best year of 1959.

Consolidated sales for the year of $274,167,987 also set a new record, 8% above the $254,111,740 reported for 1960 and 5% over the previous record sales reported for 1959.

The accompanying comparative balance sheet as of December 31, 1961, certified by our auditors, reflects a continuation of the strong financial position of your Company. Working capital increased to $69,241,438, after segregation of $10,000,000 in government securities to finance our planned plant expansion program scheduled to start early this year.

Accounts receivable and inventories increased 33% and 21% respectively from the year earlier as a result of substantially higher sales volumes in the last quarter of 1961 and larger production schedules for the first quarter of 1962.

### DIVIDENDS

Dividends declared during 1961, after adjustment for the November 3, 1961 stock distribution of two additional shares for each share outstanding, amounted to $1.00 per share. Dividends paid in 1961 amounted to $1.16⅔ per share (including the special dividend of 16⅔¢ per share declared out of 1960 earnings).

### SUBSIDIARIES

Subsidiary company operations contributed record sales and earnings for the year. Individual company operations, in most instances, surpassed any prior year.

Zenith Sales Corporation, responsible for marketing consumer products in the domestic and export markets, reported excellent results in both sales and earnings for its second year of operation.

The Rauland Corporation, with high starting costs on several new cathode ray tubes absorbed in 1960 behind them, reported substantial increases in both sales and earnings despite increased expenditures for new product research and development.

Profits of Zenith Radio Corporation of Canada Ltd. were adversely affected during the year by the Canadian government's action which put the Canadian dollar at a discount, rather than the premium position it had previously held, in relation to the U. S. dollar.

### CONSUMER PRODUCTS

Your Company's constant objective to insure Zenith's leadership was highlighted in 1961 by two new consumer electronic products and the introduction of a number of exclusive new features to strengthen and improve existing products.

In August, your Company introduced a complete line of color television receivers. The new color television receivers, designed to give superior performance, stabil-

ity and reliability comparable to Zenith's black and white sets, are the result of years of extensive research and development work at Zenith and Rauland. The new color receivers, featured on pages 10 and 11, have received an enthusiastic market reception and it was necessary to expand production facilities in an effort to meet consumer demand.

Production of the new Zenith Stereo FM receivers began in September. FM Stereo brings to the public an entirely new concept in radio broadcasting and reception to enhance the radio listener's pleasure. The new system developed by Zenith engineers was first tested over the Company's Chicago FM station, WEFM. The broadcasting standards approved by the Federal Communications Commission, with minor modifications, are based on this Zenith development. We are proud of the creative role Zenith played in this important new development.

The quality, performance and technical advantages of black and white television receivers featuring Zenith developed automatic Fringe Lock circuit, Gold Video Guard Turret Tuner, handwired chassis, Space Command remote control, and other exclusive features have again made Zenith the No. 1 choice of the consumer. Production and factory shipments of Zenith black and white television receivers during 1961 were the highest of any year in the Company's history, exceeding one million units for the third successive year. Zenith distributor sales to dealers during the year were also at a record high.

Radio receiver production and shipments in 1961 established a new record high. Significant increases were attained in the AM/FM and the transistorized portable categories. The acknowledged leadership of the Royal 500, pocket-type transistor radio, was further strengthened during the year with introduction of the new Zenith Royal 500H, a completely re-engineered model incorporating an advanced new speaker to increase performance.

The smallest hearing aid ever to be designed and produced by Zenith was introduced during the year to further strengthen our complete line of quality products for the hard-of-hearing. The Hearing Aid Division enjoyed one of the best years in its history.

Representative Zenith quality consumer products, along with some of their exclusive features, are highlighted later in the report.

**RESEARCH AND SPECIAL PRODUCTS**

Of significant importance to your Company's future growth and diversification is the increased recognition being accorded the scientific and development efforts of Zenith Radio Corporation and its subsidiaries.

Research and engineering, directed exclusively to electronics, have been major contributing factors to Zenith's acknowledged leadership in the electronics field. During 1961 our programs in this area were further strengthened and accelerated.

The electron beam parametric amplifier, invented and developed by Zenith scientists, has found increased acceptance as a low-noise, highly stable amplifier for extending the range of radar, radio telescope, missile tracking, aerial navigation and other systems in the UHF and microwave frequency ranges. The Zenith parametric amplifier's characteristics have proven it uniquely applicable to our government's advanced space and defense programs. Research and development contracts for parametric amplifier tubes showed a substantial increase in 1961.

The new emphasis upon conventional weapons in our country's defense efforts has resulted in Zenith receiving a number of contracts for the development and manufacture of proximity fuzes. Your Company has continued to be one of the leaders in the development and manufacture of mechanical and electrical arming devices for the military services.

Sales of image intensifier, scan converter, flat face radar, and other special purpose tubes manufactured by The Rauland Corporation were at an all time high during 1961. An extensive expansion program to provide Rauland with additional facilities to assist in meeting the growing demand for their products and service is scheduled to start early in 1962.

During the year the flash X-ray system, developed by Zenith Radio Research Corporation, was further engineered and improved to expand its application in the medical and industrial fields.

**EXPORT**

Export sales of television receivers, radios, stereophonic high fidelity and other consumer products were at an all time high in 1961, up 65% from 1960. As in previous years, export operations were hampered by import restrictions and dollar exchange shortages. During the year the severity of foreign competition in many world markets was without precedent. This was particularly true of transistor radios where prices dropped sharply due to over production and heavy inventories in Japan.

Zenith Radio Corporation of Canada Ltd. made gratifying progress during the year, selling more television receivers than in the two previous years com-

bined. Consistent national advertising and the enthusiasm of distributors and dealers have created a growing demand for Zenith products in the Canadian market.

**LITIGATION**

The United States Court of Appeals for the Tenth Circuit on November 15, 1961, affirmed the judgment of the District Court, holding all of the Zenith Space Command patents litigated valid and infringed by Admiral Corporation. The amount of damages to be recovered by Zenith will be determined in an accounting proceeding conducted in the United States District Court for the Western District of Oklahoma. Zenith's claims against Admiral Corporation for infringement of its Fringe Lock patents were favorably settled after the District Court had entered judgment holding those patents valid and infringed.

On April 15, 1959, a similar suit was filed in the United States District Court for the Northern District of Illinois against Motorola Inc., charging it with infringement of five Zenith patents on its Fringe Lock and Space Command features. On December 14, 1960, Motorola brought suit in the same court against Zenith, alleging infringement of a television circuit patent. In the opinion of counsel, the latter suit is without merit.

On November 20, 1959, the Company was sued by Hazeltine Research, Inc., for alleged infringement of a single Hazeltine patent. In the opinion of counsel, no valid claim of the Hazeltine patent is infringed and the patent is unenforceable.

During the year extensive discovery proceedings were conducted in preparation for the Company's law suit against Marshall-Wells Company for unfair competition in merchandising of Zenith-branded kitchen and laundry appliances. The suit, in which damages and injunctive relief are sought, was filed in 1958, and it is expected that the action will be tried in 1962.

The Company is also involved in certain other actions arising out of matters incident to the ordinary conduct of its business and adequate provision has been made for any possible liability resulting therefrom. In the opinion of management and counsel the outcome of these litigations should be favorable to the Company.

**PHONEVISION**

Production and testing of transmitter and decoder equipment to be used in the Hartford, Connecticut, test of the Company's Phonevision system of subscription television are progressing on schedule. The Hartford test is scheduled to start prior to July 1 of this year.

A review of Phonevision activities is summarized on pages 22 and 23.

**FACILITIES**

In August production was started in the new 100,000 square foot plant constructed in Paris, Illinois for Central Electronics, Inc.

Plans are being finalized for the new 700,000 square foot building to be constructed on the land acquired in 1960 adjacent to Zenith's main plant. The new building will be devoted to manufacturing, warehousing, and general administrative offices. Construction of the new plant is scheduled to begin early this year.

**EMPLOYEE RELATIONS**

One of the Company's most important assets is the loyalty and diligence of its employees who have contributed immeasurably to Zenith's progress and growth. An excellent relationship continues to exist between the Company, the employees and the unions representing hourly paid employees.

During the past year 162 new members joined the Zenith Pioneers, an organization of employees having twenty or more years of active service. The present 724 Pioneers represent a total of more than 17,000 years of service with the Company.

The Zenith Profit Sharing Retirement Plan, whose holdings include 672,300 shares of Zenith stock, provides our employees with a strong incentive to reduce costs, improve performance and increase profits.

**OUTLOOK**

The year 1962 gives promise of being another period of outstanding growth for Zenith. Based on the pattern set in January and February it is expected that sales for the first three months of 1962 will be the highest for any first quarter in Zenith's history.

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Your management is grateful for the loyalty and outstanding efforts of the thousands of people—employees, distributors, dealers and suppliers—who have contributed so much to our success, and upon whom we rely for our future progress.

Respectfully submitted,

Hugh Robertson, *Chairman*

March 8, 1962

Joseph S. Wright, *President*

# APPENDIX B

## HEARINGS

Before the
SUBCOMMITTEE ON
PATENTS, TRADEMARKS, AND COPYRIGHTS
of the
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
Eighty-Ninth Congress
First Session
pursuant to
S. RES. 48
on
S. 789, S. 1809, and S. 1899

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Part 1

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June 1, 2, and 3, 1965

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[1] GOVERNMENT PATENT POLICY

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Tuesday, June 1, 1965

U.S. Senate, Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10 a.m., in room 3302, New Senate Office Building, Senator John L. McClellan presiding.

Present: Senators McClellan, Hart, and Burdick.

Also present: Thomas C. Brennan, chief counsel; Edd N. Williams, assistant counsel; and Stephen G. Haaser, chief clerk, Subcommittee on Patents, Trademarks, and Copyrights.

Senator McClellan. The committee will come to order.

This hearing by the Subcommittee on Patents, Trademarks, and Copyrights has been called for the consideration of four bills concerned with various aspects of Government patent policy. Three of these bills—S. 789, introduced by Senator Saltonstall; S. 1809, introduced by myself; and S. 1899, introduced by Senator Long of Louisiana—are primarily concerned with the disposition of property rights in inventions resulting from Government-financed research and development. The fourth bill before the subcommittee is S. 1047, by Senator Williams of New Jersey, which deals with the procurement by the Government of products which have been produced in violation of U.S. patents. Senators Saltonstall, Long, and Williams have indicated that they will appear at tomorrow's hearings of the subcommittee.

This subcommittee has been engaged for some time in a study of the patent policies and practices of the various departments and agencies. A number of studies have been published by the subcommittee, and extensive hearings have previously been conducted.

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[328] GOVERNMENT PATENT POLICY

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AFTERNOON SESSION

Senator McClellan. Senator, come around, please, sir.

STATEMENT OF HON. RUSSELL B. LONG, A U.S. SENATOR FROM THE STATE OF LOUISIANA; ACCOMPANIED BY BENJAMIN GORDON, STAFF ECONOMIST, MONOPOLY SUBCOMMITTEE OF SENATE SMALL BUSINESS COMMITTEE

Senator Long. Mr. Chairman, I wish to beg the forgiveness of this committee for not being here this morning. I was discussing national security matters with the President.

Senator McClellan. That is all right.

Senator, how do you want to handle your prepared statement? Do you want to read it or submit it?

Senator Long. I would just as soon read it, if I may.

Senator McClellan. All right, proceed.

Senator Long. Mr. Chairman,

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[331] GOVERNMENT PATENT POLICY

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III. SOME INTERNATIONAL ASPECTS OF GOVERNMENT PATENT POLICY

There are many reasons why the Government should retain title to the results of publicly financed research. One of these reasons is the effect on the country's balance of payments and the military aspects. Let me give you some specific, concrete cases.

A recent court decision in the U.S. District Court for the Northern District for the Court of Illinois (*Hazeltine Research, Inc.* v. *Zenith Radio Corporation*) has revealed how a firm, the Hazeltine Research, Inc., with a large patent portfolio, has prevented American firms such as Zenith, through international patent pooling arrangements, from exporting their goods to important foreign markets.

I ask consent of the chairman that the findings of fact and conclusions of law of this case be inserted into the record at the conclusion of my remarks.

Senator McClellan. Without objection, so ordered.

Senator Long. What is especially intolerable is that U.S. Government funds paid for 90 percent of the research which enabled this company to accumulate its patents. In essence, then, public funds have been used to prevent Americans from exporting their goods. Indications are

that this practice is widespread, and the effects on our balance of payments are undoubtedly very serious.

It doesn't make sense to allow this to go on, and at the same time make it difficult for ordinary citizens who have saved their money for years to go on a foreign vacation or to make it hard for them to bring in gifts for their friends and families by cutting down customs exemptions from $100 to $50, while at the same time we spend public money to put an American corporation in a position to forbid another American corporation to export products invented and produced here.

International patent pools can also undermine our national safety. They have been used in the past
[332] to transmit military information—even to our enemies. A good example is the case of the Bausch & Lomb Optical Company. Contracts between this company and Carl Zeiss of Germany resulted in Bausch & Lomb transferring to the German concern, the designs and engineering data developed with funds supplied by our own Navy Department. Senator Kilgore, of West Virginia, in a speech on the Senate floor on May 19, 1947, told of his experience after V-E Day when he discovered German binoculars made by Zeiss which were an exact duplicate of the Navy's 7.5 binoculars, which we thought were secret. The use of this patent pool enabled the entire German Army to be equipped with the latest optical instrument we had, and which was developed with public funds. In other words, Mr. Chairman, public funds were used to assist those who wanted to destroy us.

Another example of the use of international patent cartels is the case of magnesium. A cartel arrangement among I. G. Farbenindustrie, the Aluminum Co. of America and Dow Chemical Co., established Dow as the sole producer of the metal in the United States. The U.S. output was deliberately kept small because of a high-price

policy followed by Dow for its own private gain and because of the Aluminum Co.'s insistence that Dow not offer a cheap substitute for aluminum. In 1938, when Hitler's Germany had a production of 12,000 tons, our own production was kept at only 2,400 tons for the advantage of a private American firm. Moreover Dow's exports were limited to a specified amount to a single customer in Great Britain, who was then preparing to defend freedom in Europe, and to certain quantities which I. G. Farbenindustrie agreed to buy. Dow, by agreement couldn't even export to the European Continent. In this particular case an international patent cartel undermined the defense programs of our allies in Europe by withholding strategic raw materials from them and kept our own country weak by restricting production of this essential material.

The pushing and shoving by private firms to get the right to patent the results of Government-financed research must be stopped. Otherwise, we shall find that most of the results of our research, paid for by the American public, will be in the hands of foreign cartels. We already have considerable material showing that this is happening. The Monopoly Subcommittee of the Senate Small Business Committee since 1962 has been studying the relationship of Government patent policy, international cartels, and their effect on our foreign trade and balance of payments.

IV. PHILOSOPHY OF PATENT SYSTEM

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## APPENDIX C

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 49

ZENITH RADIO CORPORATION,
a corporation,
Petitioner,

vs.

HAZELTINE RESEARCH, INC.,
a corporation, and
HAZELTINE CORPORATION,
a corporation,
Respondents.

### AFFIDAVIT OF DAVID WESTERMANN

State of New York }
County of Queens } ss.

DAVID WESTERMANN, being duly sworn, on oath deposes and says:

1. He is President and chief executive officer of Hazeltine Corporation, one of the respondents, and has held such office since December 21, 1966. From November 15, 1961 to December 21, 1966, he was Vice President and General Counsel of Hazeltine Corporation.

2. In late September of 1966, he was advised by Mr. David Lewis, legal counsel of The General Electric Company Limited, in London, that Mr. John Borst, Jr., an attorney in the firm of McConnell, Freeman, Curtis & McConnell,

134 South La Salle Street, Chicago, Illinois, counsel for Zenith Radio Corporation, had on Zenith's behalf inquired of Mr. Lewis in London as to whether General Electric was the licensee or licensing agent for the British television patents of Hazeltine Corporation.

Following receipt of such information he, David Westermann, wrote to Mr. Borst under date of October 10, 1966 advising that The General Electric Company Limited was neither licensee nor licensing agent of Hazeltine Corporation's British color television patents or other patents, and that "anyone interested in a license under any of those patents should address his inquiry to Hazeltine Corporation in New York." Copies of said letter of October 10, 1966 (and of the September 30 and October 4 letters referred to therein) are attached hereto. Hazeltine Corporation has never received an inquiry or an acknowledgment of the letter from Mr. Borst or anyone else connected with Zenith. These patents are still owned by Hazeltine Corporation, and the statement that anyone desiring a license under those patents should contact Hazeltine Corporation still applies.

3. After the trial court had entered his April 5, 1965 judgment and decree as to Canada against Hazeltine Research, Inc. and Hazeltine Corporation, Hazeltine Corporation promptly initiated steps to secure modification or termination of the agreement licensing its Canadian patents to Canadian Radio Patents Limited (CRPL) which by its terms was not subject to termination until June 30, 1966. The agreement was terminated effective December 1, 1965, by agreement dated as of December 30, 1965, except that CRPL agreed to such early termination only subject to reservation by CRPL of the right to grant additional sublicenses to its existing licensees for the existing term expiring June 30, 1966, on a non-exclusive basis.

4. Hazeltine Corporation has at all times believed that the agreement licensing its patents to CRPL was lawful and not a violation of the Sherman Act. However, it decided that the burden of continuing and possible further litigation over the legality of its license to CRPL and of CRPL's practices would be prohibitive, and that accordingly Hazeltine Corporation would have to accept the risks involved under the Canadian Patent Act in the event it were determined that its licensing of imports constituted an abuse of its Canadian patents.

5. Since the termination of said agreement with CRPL, Hazeltine Corporation has been prepared to enter into agreements covering any one or more of its Canadian patents as the other party may see fit, and with no restriction on imports. A number of such agreements have been entered into with United States, Canadian and Japanese television manufacturers, and such an agreement is available to Zenith, on a non-discriminatory basis, should it desire one.

/s/ DAVID WESTERMANN

Subscribed and sworn to
before me this 13th day
of September, 1968.

/s/ BARBARA A. BLUMLEIN
Notary Public

Notary Public State of New York
Qualified in Nassau County
My Commission Expires: March 30, 1970

HAZELTINE CORPORATION
LITTLE NECK 62, NEW YORK

CABLE
NEUTRODYNE

FACULTY 1-2300
TELETYPE 426-0098
AREA CODE 212

1966 October 10
Serial XXX-66-G1-837

John Borst, Jr., Esq.
McConnell, Freeman, Curtis
& McConnell
134 South LaSalle Street
Chicago, Illinois 60603

Dear Mr. Borst:

We have received from Mr. David Lewis of The General Electric Company Limited in London a copy of your letter to him of September 30 and of his reply of October 4 addressed to you in Chicago. Also, I have talked to Mr. Lewis on the telephone. I believe that a clarification of your expressed understanding is in order.

My understanding is that Mr. Lewis did not tell you that The General Electric Company Limited is licensing agent for Hazeltine Corporation on the color television patents owned by Hazeltine Corporation in Great Britain, and that he suggested to you that any inquiry concerning the licensing of such patents should be addressed by you to Hazeltine Corporation in the United States. The fact is that The General Electric Company Limited is neither licensee nor licensing agent of Hazeltine Corporation's British color television or other patents, and anyone interested in a license under any of those patents should address his inquiry to Hazeltine Corporation in New York.

Very truly yours,

D. Westermann
Vice President and
General Counsel

DW:jl

The Carlton Tower,
Cadogan Place,
London.S.W.1.

September 30th.1966

Mr. David Lewis,
Legal Director,
General Electric Co.Ltd.
1.Stanhope Street.
London.W.1.

Dear Mr.Lewis,

This letter will confirm the matters I today discussed with you and as well with Mr. Holland, Manager of the G.E.C.Patent Department.

Zenith Radio Corporation, as I informed you, is preparing to market its American manufactured Color TV receiving sets and components in Great Britain in time for the scheduled introduction of color broadcasting in October 1967. In consequence I have come to Great Britain to make arrangements for securing any necessary patent licences to permit the importation of Zenith apparatus for sale on this market.

The General Electric Co.Ltd., you confirm, is licensing agent for Hazeltine Corporation on the Color TV patents obtained by Hazeltine in Great Britain.

I therefore today sought to determine whether G.E.C. would grant to Zenith a licence under such Hazeltine Color TV patents as may be applicable to Zenith's apparatus and which would permit the importation into Great Britain for domestic sale of Zenith Color TV receiving sets and components.

You advise me that G.E.C. is not in a position at present to answer this inquiry and that the availability of the licences sought by Zenith depends upon such instructions as G.E.C.may receive from Hazeltine Corporation in United States. You therefore suggested that Zenith confer directly with Hazeltine Corporation with reference to securing the subject importation licence.

I believe that this letter correctly summarises our conversation but would appreciate receiving a letter from you at our Chicago offices in the event I have in any way misunderstood your advice.

Very truly yours,
MC CONNELL, FREEMAN, CURTIS & MCCONNELL

By: John Borst Jr
John Borst, Jr.

134.South La Salle Street.
Chicago. Illinois, 60603.
U.S.A.

c.c. D. Westermann, Esq.

L.44

Mr. John Borst, Jr.,
Messrs. McConnell, Freeman,
Curtis & McConnell,
134, South La Salle Street,
CHICAGO, Illinois 60603.

4th October, 1966.

Dear Mr. Borst,

I acknowledge receipt of your letter of the 30th September and I regret that you appear to have misunderstood what I said.

It is unfortunate that, in elaborating the theme of our talk in your letter, inaccuracies have crept in but there is no point in dealing with these item by item. If I were asked to summarise our telephone conversation I would say :-

"You stated that you were in England to negotiate, inter alia, a licence to use Haseltine United Kingdom Colour TV patents and I told you that you would have to negotiate such a licence with the Haseltine Corporation in the United States."

There is really nothing relevant which one could add to this.

Yours sincerely,

D. Lewis.

APPENDIX D

# Ideal Electric Supply Limited

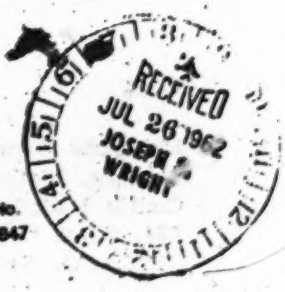
Major Appliances

Zenith Radio Television Stereo-Hi-Fi

DISTRIBUTORS

898 PRINCE ST. PHONE 893-9463
TRURO, NOVA SCOTIA

23rd July, 1962.




Hazeltine Research, Inc.
vs. Zenith Radio Corporation
Defendant's Exh. No. 142 D
C.A. No. 58-C-1847

Zenith Radio Corporation
6001 Dickens Ave.
Chicago 39.
Illinois.
U.S.A.

Att: Mr Joseph S. Wright. President.

Dear Mr Wright:

When in Montreal and Toronto in June at the Open House Showing I was given to understand that either you or Mr Caplin would be interested in receiving a copy of the letter our competitors namely Electrical Distributors Ltd., of this town received from our friends Canadian Radio Patents Ltd., of Toronto relative to them importing sets manufactured in U.S.A. by Motorola.

If you were not the interested party in this information would you kindly hand same on to Mr Caplin, as I was able to receive a photostatic copy from Electrical Distributors Ltd. of this town, it is quite evident that our friends Canadian Radio Patents Ltd., are trying to use the same tactics as they did on us a number of years back.

If you are interested in any further information as to the proceedings now taking place I would be glad to obtain for you the photostatic copies of such correspondence.

Thanking you for past favours, I remain,

Yours very truly,
IDEAL ELECTRIC SUPPLY LTD.

N.A. MacCuspie.

N.A. MacCuspie. President.

NAM/pw

# APPENDIX E

Le Secrétaire d'État — The Secretary of State

Canada

I, Bondfield Marcoux, Special Assistant to the Secretary of State, hereby certify that attached hereto are true copies of the cover page and pages 7625, 7626 and 7627 of the reports of the Debates of the House of Commons, First Session, 27th Parliament, 15 Elizabeth II, Volume VII, 1966.

That the said reports were published under the authority of the Queen's Printer for the Government of Canada.

Ottawa, August 27, 1968.

Bondfield Marcoux

L. Saint-Martin

Witness

Library
Dept. of the Secretary of State
Bibliothèque
Ministère du Secrétariat d'Etat
June 5, 1967

CANADA

# HOUSE OF COMMONS DEBATES

## OFFICIAL REPORT

FIRST SESSION—TWENTY SEVENTH PARLIAMENT

15 ELIZABETH II

VOLUME VII, 1966

COMPRISING THE PERIOD FROM THE TWENTIETH DAY OF JUNE, 1966, TO THE FOURTEENTH DAY OF JULY, 1966, INCLUSIVE

INDEX ISSUED IN A SEPARATE VOLUME

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

22022—4181

...ing my office notice of this question. I ...e checked with Mr. Hamel, and the chief ...ctoral officer advises me that this report is ...any thousands of pages in length. Normally ...the past it has taken eight to ten months to ...pare and print it after each election. He ...forms me that members may expect to have ...some time during the month of September.

## HEALTH AND WELFARE

### ESTROGEN—TREATMENT OF ANIMALS USED IN DRUG PRODUCTION

On the orders of the day:

Mr. T. S. Barnett (Comox-Alberni): Mr. Speaker, I have a question for the Minister of National Health and Welfare. I should like to ask the minister whether the government has had any discussions with the Ayerst-McKenna Company in Montreal, which I am informed has a monopoly on the production of the drug estrogen, in connection with ensuring that no inhumane practices are involved in the treatment of animals which are required for the production of this drug.

Hon. A. J. MacEachen (Minister of National Health and Welfare): Mr. Speaker, I myself have had no discussions. I will inquire whether my officials have had any discussions on this matter.

[Translation]

## CANADIAN BROADCASTING CORPORATION

### REQUEST FOR REPORT ON DISCUSSIONS WITH UNIONS

On the orders of the day:

Mr. Maurice Allard (Sherbrooke): Mr. Speaker, I would like to direct a question to the Minister of Labour.

Can he tell the house how much progress has been made by the ministerial committee in the conflict which involves, on the one hand, the C.N.T.U. and the employees of the C.B.C. French network and, on the other hand, the National Industrial Relations Board about the definition of the negotiating unit?

[English]

Hon. J. R. Nicholson (Minister of Labour): Mr. Speaker, for some reason that I have not been able to understand the transcript of the proceedings of the meeting of the cabinet committee with the Canadian Labour Congress and the railway brotherhoods when they made their submissions is not yet available. Whether this is because of a shortage of translators or whatever the reason, the committee has not received the copies of the transcript. We are anxiously awaiting it, and will give the matter prompt attention when the transcript is received.

## BUSINESS OF THE HOUSE

### COMMITTEE CONSIDERATION OF LABOUR SAFETY CODE

On the orders of the day:

Hon. J. R. Nicholson (Minister of Labour): Mr. Speaker, while I am on my feet, may I deal with a matter that was raised by the hon. member for Ontario during the question-period a few days ago.

In reply to the question asked by the hon. gentleman with regard to Bill S-35, may I say this. He asked whether an opportunity would be given to interested organizations to present their views to a committee of this house. I stated that such an opportunity had been afforded in the other place to appear before that committee, and some organizations had taken advantage of it. However, since now there are others who want to be heard they will be afforded the opportunity to so appear. It is the intention of the government to refer this matter to the committee of this house on labour and employment as one of its first items of business after the recess.

• (3:20 p.m.)

## TELEVISION

### ANNOUNCEMENT RESPECTING ALTERATION IN TIMETABLE FOR COLOUR TRANSMISSION

Mr. Speaker: Order. I understand the Secretary of State wishes to revert to motions for the purpose of making a statement. Does the house agree?

Some hon. Members: Agreed.

Miss Judy V. LaMarsh (Secretary of State): Mr. Speaker, the house may recall that last September the government announced its decision to implement the introduction of colour television in Canada by a three-stage process.

By this decision, stations prepared to undertake colour casting were permitted to commence test transmissions during the night-time period starting July 1; to begin regular colour transmissions on a shakedown basis on October 1; and to have all colour transmissions up to full technical requirements by next January 1.

This timetable was worked out in consultation with all interested parties and was accepted by them at that time. The primary consideration in setting the various dates was the need to allow sufficient time for the necessary technical installations and staff training.

In recent months, however, it has become apparent that technical preparations for colour casting are advancing within the industry on a much quicker basis than had been anticipated. In view of these developments, representations have been made to the government, particularly by the Canadian Association of Broadcasters, to amend the colour timetable accordingly and especially to move up the October 1 date for full colour transmissions to coincide better with the start of fall program schedules.

The government has given consideration to these representations and, in view of the declared readiness of the various elements of the broadcasting industry to meet an earlier date, we are now prepared to authorize full colour transmissions as of September 1. The remaining four months of this year will continue to be treated as a shakedown period during which minor equipment and operating adjustments can be made in order that all technical requirements may be met as of January 1.

The decision to permit full colour transmissions is open to both the public and private sectors of the broadcasting industry. In the case of the Canadian Broadcasting Corporation, however there is a caveat. Any alteration in its plans will have to be carried out within the limits of operating and capital funds already approved for the current fiscal year. This is in keeping with the government's view on this subject as outlined in the white paper on broadcasting.

Mr. Speaker, I believe the advance of one month in the introductory date for full colour transmissions will be of value both to the broadcasters and to the viewing public in permitting both to enjoy the benefits of colour from the outset of the fall program season.

**Mr. L. R. Sherman (Winnipeg South):** Members of this party heartily welcome the announcement which the hon. lady has just made with respect to colour telecasting in this country. We are delighted that technical developments as outlined by the minister have been proceeding faster than anticipated, and that the colour schedule can be up-dated as a consequence. We certainly think the news will be welcomed by all Canadians, at least by those of them within range of television outlets.

Colour telecasts on an east-west basis can, in the opinion of hon. members of this party, make a great contribution to Canadian unity and will be particularly valuable in centennial year. Hopefully, the new medium will provide a great opportunity for Canadians from coast to coast to experience in living colour, as the phrase goes, the beauties of this land in all its provinces and all its various regions. In addition, the colour telecasting of many of the great centennial pageants and programs which are planned should serve to inspire all of us with the love for Canada which we all hold, but all too seldom express.

However, colour production is not the be all and the end all of television programming and we would urge that the government proceed with all possible haste in extending television service to the north and to those other regions which are currently under-serviced. This, we believe, is a primary priority. As I say, while welcoming the announcement with respect to colour broadcasting we hope the government will proceed with all possible dispatch to cover those regions which desire to be included within the broadcasting net.

**Mr. David Lewis (York South):** The other day the hon. member for Winnipeg South and I had some disagreement with regard to one field of broadcasting. I rise on behalf of this party today to express full agreement with him in his emphasis on the need, first, of extending the opportunity for television reception to areas which do not presently have it. This must be given first priority in our plans, and I do not need to take the time of the house by emphasizing it.

As to colour television itself, I should like to express my fear that the financial limitations which have been placed upon the Canadian Broadcasting Corporation may result in private broadcasting stations securing a really important advance in this field over the corporation. I hope the Secretary of State and her advisors will keep a careful eye on developments so as to avoid the C.B.C. falling behind private broadcasting in this field.

[*Translation*]

**Mr. Gérard Laprise (Chapleau):** Mr. Speaker, we listened with interest to the statement made by the Secretary of State (Miss LaMarsh) and we are happy to learn that we will have colour television in a not too distant future.

As far as I am concerned, I would have much preferred that the Secretary of State announce that more remote areas, such as the Chibougamau-Chapais area, where people must deposit $200 and must pay a $100 surtax per annum to watch black and white television, would get free black and white television service, like all other regions of Canada.

In any event, I hope that work will continue in the C.B.C. toward providing television service as soon as possible to all northern regions so as to give them the same services as enjoyed everywhere else in Canada.

[*English*]

## INCOME TAX ACT

The house resumed from Thursday, July 7, consideration of the motion of Mr. Sharp for the second reading of Bill No. C-216 to amend the Income Tax Act and to repeal the Canadian Vessel Construction Assistance Act.

**Mr. Speaker:** Is the house ready for the question?

The hon. member for Nanaimo-Cowichan-The Islands.

**Mr. Colin Cameron** (Nanaimo-Cowichan-The Islands): Thank you, Mr. Speaker. I am aware that my title is a great trial to you.

**An hon. Member:** It is to you, too.

**Mr. Cameron** (Nanaimo-Cowichan-The Islands): It is to me, too, I may say.

I had not intended earlier to speak on second reading of the income tax bill on the ground that most of what could be said had already been said during the budget debate. However, since that time the minister has introduced other legislation in this field which reveals rather clearly, in conjunction with the income tax bill, the economic philosophy of the minister and of the government. In the bank bill it became obvious that the minister's policy was to control inflationary pressures by a certain method. He had two courses open to him; one was that of a monetary course and the other was that of a fiscal course. He has chosen the monetary course.

(3:30 p.m.)

I was interested to hear him tell us a few moments ago that the government had done everything in its power to control inflationary pressures. I presume he had reference to the pleas which the government made to subordinate governments and private industry to curtail expansion in their investment programs. I think this clearly underlines the fact that the choice of the monetary method of controlling inflationary pressures is not the most suitable means by which to achieve this end. I would suggest to the minister that had he been prepared to deal with this problem as a fiscal one, he might well be likely to achieve some success. It is pretty well recognized that the principal stimulus to economic expansion, and thereby to inflationary pressures in certain periods, lies not so much in the field of consumer spending power as it does in the level and direction of investment.

I should have liked to see the government tackle this problem, and the other problems in our society, in a fiscal manner. I suggest if the minister and the government are seriously concerned about the dangers of inflationary pressures, then there should have been a review of the level of the corporation profits tax, and a review of the present rather generous depreciation and depletion allowances in order that the drive toward growth and greater investment would have been to some extent curtailed.

After all, a classic method of preventing inflation getting out of hand is to impose taxes on the large corporations which, from their internally generated savings, are able to add to inflationary pressures by an expanded investment program. I would suggest at the same time that had this been done it would also have been advisable to have considered a revision of the personal income tax structure in the interests of equity in our society, and also I would suggest in the interests of some control of the inflationary pressures, because it is fairly well generally accepted now that additions to the purchasing power of certain economic groups, the lower economic groups in our society, do not necessarily lead to inflationary pressures.

Certainly there can be no argument about the necessity for a revision from the point of view of equity. We in this party have urged for a long time that the category of those who are exempt from personal income tax should be enlarged.

I want to make it quite clear, Mr. Speaker, that I am not advocating a revision of the income tax exemptions because I am well aware that if one merely moves up the limit of income tax exemptions, he profits those in the higher income brackets more than those in the lower income brackets. But I do suggest that means should be found whereby married couples, with an income of $3,000 and less, should be exempt from paying

## 1967 CANADIAN TELEVISION MARKET AND ZENITH'S SHARE THEREOF

| | Number of Sets |
|---|---|
| Canadian Manufacturers' Sales* | 522,700 |
| Total Imports into Canada from All Countries* | 199,600 |
| Total Canadian TV Market | 722,300 |
| Total Exports from U.S. to Canada** | 56,393 |
| Total Exports of TV Sets from U.S. to Canada as a Percentage Share of Total Canadian TV Market | 7.8% |

Thus, even if we assume that all the TV sets exported from the U.S. to Canada were Zenith (which of course was not the case), Zenith's share of the total Canadian TV Market in 1967 could not have been more than 7.8%. And if we assume (as Zenith represents) that it had 18% of the Color TV Market in Canada, its share of the Black and White Market must have been substantially less than 7.8%, and, thus, not much higher (if indeed at all higher) than the 5% share it achieved in 1961, long before the injunction.

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* Source: Canadian Statistical Review, Dominion Bureau of Statistics, Ottawa, Canada, Vol. 43, No. 5, Table 58, p. 41 (May, 1968) (see p. A-42, *infra*), which is the same source used by Zenith in preparation of its damage exhibit (see A. 2610).

** Source: U.S. Bureau of the Census, U.S. Exports—Commodity by Country, Report FT 410, December Edition for years 1965-1967, which is same source used for Zenith's Appendix B, Schedule 1 at p. A-25 of its brief.

## Table 58: radio and television receiving sets[1] (thousand units)

| monthly averages or months | manufacturers' sales of "made-in-Canada" sets | | | | | | | | | | | | | | imports[4] | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | radio receivers | | | | | | television receivers | | | | | | | | | |
| | total | home sets | portables | auto | combinations[2] | record players[3] | total | Atlantic prov. | Que. | Ont. | Man. | Sask. | Alta. | B.C. | radio sets | television sets |
| 1965 | 93.1 | 23.2 | 1.7 | 55.3 | 12.8 | 20.9 | 46.3 | 3.8 | 12.5 | 17.4 | 2.6 | 1.8 | 3.4 | 4.7 | 113.7 | 5.3 |
| 1966 | 95.5 | 17.8 | 1.0 | 68.6 | 12.2 | 23.0 | 43.3 | 3.5 | 11.1 | 17.1 | 2.5 | 1.5 | 3.2 | 4.3 | 96.1 | 10.3 |
| 1965 O | 122.7 | 34.7 | 2.2 | 69.1 | 16.8 | 37.8 | 64.2 | 5.6 | 17.1 | 23.5 | 3.9 | 2.6 | 4.8 | 6.9 | 131.4 | 10.3 |
| N | 126.4 | 34.1 | 1.3 | 69.1 | 21.9 | 49.2 | 62.4 | 5.2 | 16.1 | 23.8 | 3.8 | 2.5 | 4.4 | 6.7 | 139.5 | 6.8 |
| D | 137.6 | 42.3 | 3.3 | 68.2 | 23.8 | 41.9 | 55.6 | 4.4 | 14.2 | 22.2 | 2.8 | 2.2 | 4.2 | 5.4 | 109.7 | 1.9 |
| 1966 J | 83.8 | 10.1 | 0.9 | 64.6 | 8.2 | 8.9 | 31.1 | 2.7 | 7.9 | 12.2 | 1.8 | 0.9 | 2.4 | 3.1 | 53.7 | 3.3 |
| F | 98.6 | 13.9 | 1.5 | 73.6 | 9.7 | 11.7 | 37.7 | 3.7 | 9.0 | 15.2 | 2.4 | 1.3 | 2.4 | 3.6 | 64.7 | 5.8 |
| M | 74.6 | 15.3 | 0.7 | 49.3 | 9.4 | 14.0 | 38.7 | 3.4 | 10.0 | 16.2 | 1.6 | 1.2 | 2.9 | 3.5 | 88.6 | 3.6 |
| A | 73.4 | 13.0 | 0.4 | 51.8 | 8.3 | 11.0 | 36.9 | 3.4 | 9.1 | 18.1 | 1.8 | 1.0 | 2.4 | 3.2 | 81.1 | 5.8 |
| M | 83.3 | 14.4 | 1.8 | 61.7 | 5.4 | 13.3 | 29.8 | 2.0 | 8.3 | 12.2 | 1.6 | 1.0 | 2.1 | 2.6 | 111.5 | 8.6 |
| J | 70.9 | 13.7 | 0.9 | 49.6 | 6.6 | 13.3 | 32.6 | 2.8 | 9.1 | 12.7 | 1.6 | 0.8 | 2.4 | 3.2 | 106.1 | 6.0 |
| J | 41.0 | 14.4 | 1.1 | 19.4 | 6.0 | 12.7 | 33.5 | 2.2 | 9.4 | 13.1 | 1.9 | 1.1 | 2.1 | 3.8 | 143.7 | 7.1 |
| A | 82.9 | 16.3 | 0.5 | 51.6 | 14.5 | 21.3 | 48.0 | 3.5 | 12.2 | 18.4 | 3.3 | 1.9 | 3.9 | 4.8 | 110.5 | 9.3 |
| S | 122.1 | 24.1 | 1.1 | 81.9 | 15.0 | 36.5 | 59.7 | 4.4 | 15.3 | 23.5 | 3.6 | 2.1 | 4.3 | 6.5 | 134.4 | 23.0 |
| O | 151.6 | 27.9 | 0.9 | 106.9 | 15.9 | 38.6r | 61.4 | 4.8 | 15.8 | 22.3 | 3.8 | 2.7 | 5.0 | 7.0 | 145.4 | 15.9 |
| N | 169.8 | 26.2 | 1.0 | 120.1 | 22.4 | 50.4r | 60.6 | 5.0 | 14.8 | 23.4 | 3.6 | 2.5 | 5.0 | 6.3 | 151.0 | 21.2 |
| D | 142.6 | 24.3 | 0.6 | 92.6 | 25.0 | 59.8r | 49.8 | 4.4 | 12.6 | 20.1 | 2.8 | 1.7 | 3.8 | 4.4 | 97.9 | 13.6 |
| 1967 J | 98.5 | 8.5 | 0.9 | 78.0 | 11.1 | 12.2 | 36.1 | 2.2 | 9.1 | 14.6 | 2.0 | 1.1 | 2.7 | 3.4 | 114.3 | 17.4 |
| F | 101.7 | 11.7 | 0.7 | 79.1 | 10.2 | 11.9 | 37.4 | 3.5 | 9.0 | 14.3 | 2.2 | 1.5 | 3.1 | 3.8 | 89.5 | 11.1 |
| M | 109.5 | 12.0 | 0.7 | 86.5 | 10.3 | 16.9 | 36.1 | 3.5 | 10.3 | 12.6 | 2.3 | 1.2 | 2.6 | 3.7 | 129.3 | 11.2 |
| A | 126.7 | 13.2 | 1.0 | 104.1 | 8.4 | 10.8 | 39.2 | 3.2 | 11.8 | 13.9 | 2.4 | 1.3 | 2.9 | 3.7 | 110.7 | 13.2 |
| M | 122.0 | 10.9 | 0.1 | 103.5 | 7.5 | 10.7 | 31.0 | 2.5 | 8.9 | 12.2 | 2.0 | 1.0 | 1.7 | 2.6 | 144.0 | 11.3 |
| J | 109.6 | 9.8 | 0.3 | 90.5 | 9.1 | 16.9 | 36.9 | 2.5 | 11.8 | 14.4 | 1.6 | 1.0 | 2.6 | 3.0 | 133.5 | 13.9 |
| J | 61.0 | 10.9 | 1.2 | 39.6 | 9.4 | 14.7 | 33.9 | 2.5 | 8.9 | 14.2 | 1.8 | 1.2 | 2.4 | 3.0 | 191.5 | 18.4 |
| A | 142.3 | 14.4 | 1.4 | 112.2 | 14.4 | 25.0 | 43.4 | 3.6 | 11.4 | 16.4 | 2.8 | 1.6 | 3.2 | 4.5 | 172.2 | 20.9 |
| S | 193.3 | 22.4 | 1.9 | 149.0 | 20.0 | 36.3 | 58.0 | 4.6 | 14.3 | 21.5 | 3.6 | 2.0 | 4.6 | 7.2 | 167.9 | 19.2 |
| O | 156.0 | 21.9 | 4.2 | 110.5 | 19.4 | 42.3 | 64.0 | 5.2 | 16.0 | 24.0 | 3.5 | 2.7 | 5.5 | 7.1 | 227.6 | 19.4 |
| N | 175.0 | 20.6 | 1.3 | 131.5 | 21.6 | 50.3 | 61.4r | 5.3 | 14.7 | 24.4 | 8.6 | 2.3 | 5.2 | 5.8 | 224.0 | 25.8 |
| D | 187.4 | 17.8 | 0.2 | 147.8 | 21.6 | 42.2 | 45.3r | 3.9 | 11.8r | 18.6 | 2.2 | 1.4 | 3.8 | 3.5 | 117.0 | 17.8 |
| 1968 J | 152.6 | 7.1 | - | 136.0 | 9.5 | 9.8 | 36.9r | 3.0 | 8.2 | 15.6 | 1.7 | 1.3 | 3.3 | 3.7 | 123.1 | 18.6 |
| F | 141.6 | 10.3 | - | 119.3 | 11.9 | 12.1 | 40.9 | 3.7 | 10.7 | 16.3 | 2.2 | 1.5 | 3.2 | 3.4 | 101.9 | 15.0 |

[1]Includes record players. [2]Radio phonograph combinations. [3]Includes monaural and stereo with and without amplifiers. [4]Customs clearance; radio sets include radio phonographs, radio receiving sets transistor, n.e.s. and radio receiving sets, n.e.s. Source: Radio and Television Receiving Sets (43-004), D.B.S.